

(21,168.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 391.

STANDARD OIL COMPANY OF KENTUCKY, PLAINTIFF
IN ERROR,

vs.

THE STATE OF TENNESSEE UPON THE RELATION OF
CHARLES T. CATES, JR., ATTORNEY GENERAL OF THE
STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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a STATE OF TENNESSEE:

Be it remembered that at a Supreme Court of Errors and Appeals, begun and held at the Capitol, in the City of Nashville, on the first Monday in December, 1907, when the following proceedings were had to-wit:

Neither Judge attending, I adjourned Court until to-morrow morning at 9 o'clock.

JOE J. ROACH, *Clerk*.

The Clerk adjourned Court from day to day until Monday, December 9, 1907.

1 In the Supreme Court of Tennessee, at Nashville, December Term, 1907.

STATE OF TENNESSEE *ex Relazione, etc.*
versus

THE STANDARD OIL COMPANY.

Original Bill Filed March 16, 1907. J. D. G. Morton, C. & M.

To the Honorable J. W. Stout, Chancellor, holding the Chancery Court of Sumner County, at Gallatin, Tennessee:

The Bill of Complaint of the State of Tennessee, by and upon the relation of her Attorney-General, filed in your Honor's Court against the Standard Oil Company, a body politic and corporate under the laws of the State of Kentucky, defendant.

Complainants respectfully show unto your Honor:

I.

That the defendant, Standard Oil Company, is a corporation originally chartered and organized under the laws of the State of Kentucky, and since 1893 has been claiming the right to do, and has been doing business in the State of Tennessee, after having filed a copy of its charter in the office of the Secretary of State of complainant, State of Tennessee, on September 21, 1893; a duly certified copy thereof is herewith filed as Exhibit A to this bill, but need not be copied in issuing process. Said defendant was, at the time of the matters hereinafter shown, and still is, doing business in Sumner County, Tennessee, and has a local agent residing at, in or near the town of Gallatin, in said Sumner County.

II.

Complainant further shows and avers that in 1903 the defendant, Standard Oil Company (for convenience hereinafter referred to as defendant company), was engaged in and carrying on the business

in Sumner County, and in Tennessee generally, of a dealer in coal oil and other products of petroleum, which were and are commonly used for illuminating and other purposes, which it sold both to retail dealers and the public generally. The business of defendant company in the greater part of Tennessee, including Sumner County, was under the management and control of one J. E. Comer, whose headquarters or offices were at Nashville, in Davidson County Tennessee, and the local agent having in charge the business of said company at or near Gallatin, Tennessee, was one O'Donnell Rutherford, and there was also employed in and about the business of defendant company one C. E. Holt, who was styled a salesman, but who had charge, under the general supervision of said Comer, of the local agents and agencies of said company, inspecting the same and giving directions and instructions thereto. The said Comer, as special or managing agent, and the said Holt, acting under him, were authorized by defendant company to do, and, in fact, did, whatever, in their judgment, was necessary to advance the interests of their employer.

Complainant further shows that the oil for illuminating and other purposes handled, sold and dealt in within the State of Tennessee, was imported and brought into said State from other States, and then stored in large iron tanks located at places where defendant company established local agencies, and from said tanks, usually called storage tanks, said oils were offered for sale and sold to retail dealers, and oftentimes to the public generally. Defendant company had one of its storage tanks located at Gallatin, and from this tank it supplied the demand for oil in Gallatin and at other places in Sumner County.

Complainant further shows and avers that prior to October, 1903, defendant company had succeeded in pre-empting and securing for itself the oil business in Sumner County, and had succeeded in preventing other dealers in coming in competition with its said business in Sumner County, and at said time, to wit: In October, 1903, was engaged in selling in Sumner County an inferior grade of oil at the price of 13½ cents per gallon.

Complainant further shows that thus matters stood in relation to the oil business carried on by defendant company at Gallatin, when, on or about October 5, 1903, one Claude Rosemon, an agent or traveling salesman of the Evansville Oil Company, whose chief office was at Evansville, in the State of Indiana, and which was engaged in the business of selling, among other things, illuminating oils, went to Gallatin, in Sumner County, Tennessee, and offered for sale to certain retail dealers at that place a superior grade of oil in competition with the oil of defendant company then stored in its tanks at Gallatin, or which was being offered for sale at that place, and the said Rosemon succeeded in securing from certain customers of defendant company orders for about sixty barrels of oil at the price of 14½ cents per gallon, to be shipped from Oil City, Pennsylvania, and delivered in original packages to said persons giving said orders about November 1, 1903. Among others, said Rosemon secured an order for one S. W. Love for ten barrels of oil; from one W. H. Lane an order for five barrels of oil; from

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one J. E. Cron an order for ten barrels of oil; and from one L. C. Hunter an order for six barrels of oil.

Thereupon, information having come to defendant company that said Evansville Oil Company had secured orders for it, from, and sold oil to, its customers at Gallatin, as hereinbefore shown, and was thereby and in that manner, competing with the oil business of defendant company at Gallatin, the said defendant company and its said agents, J. E. Comer, C. E. Holt and O'Donnell Rutherford and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, unlawfully made and entered into an arrangement, agreement and combination, with a view to lessen, and which tended to lessen, full and free competition, in the sale of defendant company's oil then being sold or offered for sale at Gallatin, and the said defendant company and its said agents, Comer, Holt and Rutherford, and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, entered into and made certain unlawful arrangements, agreements or combinations which were designed to advance, and which tended to advance, the price or cost to the purchaser or consumer of defendant company's said oil then being sold or offered for sale at Gallatin as aforesaid.

And complainant further shows unto your Honor that, in order to carry said unlawful arrangements, agreements or combinations into effect, and as a part of such unlawful agreements, arrangements or combinations, the said defendant company and its said agent, C. E. Holt, induced the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter to rescind and cancel their several purchases of oil or orders for oil from said Evansville Oil Company, and as a consideration or inducement for said rescissions or cancellations, and as a part of said unlawful arrangements, agreements or combinations, said defendant company gave without cost or charge to the said S. W. Love one hundred gallons of oil, and to the said W. H. Lane fifty gallons of oil, to the said J. E. Cron one hundred gallons of oil, and to the said L. C. Hunter fifty gallons of oil, and, at its own expense, sent telegrams, in the name of said Love, Lane, Cron and Hunter, to said Evansville Oil Company, cancelling the orders of said parties.

Complainant further shows unto your Honor that the said Love and others named above not only rescinded and cancelled, in the manner, and as above shown, their several orders given to the Evansville Oil Company as aforesaid, but that they refused to accept or receive said oil when the same was shipped to Gallatin. So that the said Evansville Oil Company was driven from the field as a competitor with defendant company in the oil business at Gallatin, and thereupon defendant company, having succeeded by means of and through the aforesaid unlawful agreements, arrangements and combinations, in not only lessening, but destroying, full and free competition in the sale of its oil then stored at Gallatin and being offered for sale, immediately advanced the price of its oil, which was of inferior grade, as hereinbefore shown, from 13½ cents per gallon to 14½ cents per gallon, the price at which the said Evansville Oil Company had offered for sale and had sold

a grade of oil far superior, as complainant is informed and believes, to the oil sold by defendant company.

So that complainant avers and charges that the unlawful arrangements, agreements or combinations made and entered into between the defendant company and its said agents, Comer, Holt and Rutherford, and the said Love, Lane, Cron and Hunter, as hereinbefore shown, were not only made with a view of lessening full and free competition in the sale of defendant's oil at Gallatin, but that in fact said unlawful arrangements, agreements or combinations naturally tended to and did result in lessening and destroying full and free competition in defendant company's said oil at Gallatin, and naturally tended to and did result in advancing the price or cost of said oil to defendant's customers and the consumers of said oil in and about Gallatin, and in Sumner County, Tennessee.

Therefore, complainant charges that defendant company, a foreign corporation as aforesaid, has, in the manner hereinbefore set out, violated the provisions of section 1 of chapter 140, of the Acts of the General Assembly of 1903, and this bill is brought by the complainant, through her Attorney General as aforesaid, in order that the punishment of such violations prescribed by section 2 of said act may be imposed upon said defendant company, to wit, that said defendant company be denied the right to do, and be prohibited from doing, business in this State.

The premises considered, complainant prays:

First. That the said Standard Oil Company may be made a party defendant to this cause, according to the practice of this honorable court—that is, by due service of subpoena, and that it may be required to answer the allegations of this bill fully and truly, but its answer under oath, or the equivalent of an oath, is hereby expressly waived.

Second. For a decree enforcing the provisions of chapter 140 of the Acts of 1903, and particularly section 2 of said act, against said defendant company, to the end that it be denied the right to do, and be prohibited and ousted from doing, business within this State, and to the end that such decree may be made effectual, its permit or license to do business in this State be cancelled; that the said defendant company, its officers, agents, employes, and all persons
5 acting for it, may be perpetually enjoined from doing or carrying on its business in this State.

Third. For all such interlocutory orders and decrees as may from time to time become necessary in the progress of this cause, in order to attain the ultimate relief hereinbefore prayed, including, if it shall be necessary, an order restraining *pendente lite* the defendant company from carrying on and doing business in this State.

Fourth. And if in any way complainant is mistaken in its special prayers, it prays for all such other further and general relief as in equity it may be entitled to.

Fifth. This is the first application for an injunction or extraordinary process in this cause.

STATE OF TENNESSEE,
By CHARLES T. CATES, JR.,
Attorney-General of Tennessee.

W. A. GUILD,
R. L. PECK,
District Attorney for the State.
CHARLES T. CATES, JR.,
Attorney General of Tennessee.

STATE OF TENNESSEE, *County of* —:

Personally appeared before me, the undersigned authority, Charles T. Cates, Jr., the Attorney General of Tennessee, who, having been duly sworn, deposed and said that the statements made in the foregoing bill are true and correct, to the best of his knowledge, information and belief.

CHARLES T. CATES, JR.

Subscribed and sworn to before me on this, the 16th day of March, A. D. 1907.

J. D. G. MORTON;
Clerk and Master.

No. 237.

STATE OF TENNESSEE *ex Rel.*
versus
STANDARD OIL COMPANY.

EX. "A" TO O. BILL.

Filed March 16, 1907. J. D. G. Morton, C. & M.

STATE OF TENNESSEE, *Department of State:*

I, John W. Morton, Secretary of the State of Tennessee, do certify that the annexed is a true copy of the articles of incorporation of the Standard Oil Company of Kentucky filed in this office, on the 21st day of September, 1893, the original of which is now on record at my office.

In testimony whereof, I have hereunto subscribed my official signature; and, by order of the Governor, affixed the Great Seal of the State of Tennessee, at the Department, in the City of Nashville, this 13th day of March, A. D. 1907.

[SEAL.]

JOHN W. MORTON,
Secretary of State.

Copy.

Know all men by these presents:

That we, whose names are undersigned, desiring to become incorporated under and in the move provided by the laws of Kentucky, do sign, seal and adopt these Articles of Incorporation, to wit:

First. The names of the corporators are:
W. H. Tilford, New York City.
W. T. Jordan, Louisville, Kentucky.
L. T. Rosengarten, Louisville, Kentucky.
The name of the proposed corporation is

Standard Oil Company.

The principal place of business is Louisville, Kentucky.

Second. The general nature of the business proposed to be transacted is the manufacturing, refining, buying and selling of petroleum, and all its products, and naval stores.

Third. The amount of capital stock shall be Six Hundred Thousand Dollars, divided into shares of One Hundred Dollars each, which shall be fully paid in cash at the date of organization of the company.

Fourth. The company shall begin its existence on November 1st, A. D. 1886; and continue for twenty-five years.

Fifth. Its affairs shall be conducted by five directors, of whom three shall constitute a quorum.

Its officers shall be a President, a Vice-President, Secretary, and a Treasurer. One person may hold two of said offices.

The Directors shall be elected by the stockholders on the last Thursday of February of each year, and shall hold until their successors are duly elected. The Directors shall choose the officers, and remove them at pleasure.

7 Sixth. The Directors and officers to hold until the first Thursday of February, A. D. 1887, shall be as follows:

Directors:

W. H. Tilford,
Geo. H. Vilas,
H. H. Rogers,
J. D. Archbold,
W. P. Thompson.
President, W. H. Tilford.
Vice-President, Geo. H. Vilas.
Secretary, W. T. Jordan.
Treasurer, L. T. Rosengarten.

Seventh. The indebtedness of the corporation, whether direct or contingent, shall at no time exceed the sum of Four Hundred Thousand Dollars.

Eighth. Private property of the stockholders of the corporation shall be exempt from liability for corporate debts.

In witness whereof the said parties have hereunto set their hands and seals, this 7th day of October, A. D. 1886.

W. H. TILFORD. [SEAL.]
W. T. JORDAN. [SEAL.]
L. T. ROSENGARTEN. [SEAL.]

I, Geo. H. Webb, Clerk of the County Court of Jefferson County, in the State of Kentucky, do certify that on this day the foregoing articles of incorporation were produced to me in my office and acknowledged and delivered by W. H. Tilford, W. T. Jordan and L. T. Rosengarten, parties thereto, to be their act and deed, and that I have them and their certificate in my said office.

Witness my hand and official seal, this 7th day of October, 1886.

GEO. H. WEBB, *Clerk*.

Amendment to the Articles of Incorporation of the Standard Oil Company of Kentucky.

The Articles of Incorporation of the Standard Oil Company of Kentucky, which are recorded in corporation book No. 4, page 70, of the County Clerk's office of Jefferson County, Kentucky, are hereby amended as follows, to wit:

The amount of capital stock of said corporation shall be one million (\$1,000,000.00) dollars, to be divided into shares of one hundred (\$100.00) dollars each; and the \$400,000 of increase of capital hereby authorized shall be paid in in property at its cash value, within four months after the date hereof. The number of Directors of said corporation shall be nine.

Witness the signature and seal of said corporation, by its President, hereunto duly authorized, this 1st day of April, 1892.

[SEAL.]

STANDARD OIL COMPANY,
By C. M. PRATT, *President*.

Attest:

L. D. CLARK, *Assistant Secretary*.

STATE OF NEW YORK, County of New York:

I, Wm. H. Erwin, Notary Public, in and for said City and County, do certify that C. M. Pratt, to me personally known, appeared before me, this 9th day of April, 1892, and being by me duly sworn, said that he is President of the Standard Oil Company; that the corporate seal affixed to the foregoing instrument is the corporate seal of the said company, that the same was affixed thereto by order of the Board of Directors, and that the signature of the officers of said company, in attestation thereof, are their true and proper signatures.

Sworn to and subscribed before me this 9th day of April, A. D. 1892.

[SEAL.]

WM. H. ERWIN,
Notary Public, Kings County.

Certificate for Kings County, filed in New York County.

STATE OF NEW YORK, City and County of New York:

I, Wm. J. McKenna, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said city and county, the same being a Court of Record, do hereby certify that Wm. H.

Erwin has filed in the Clerk's office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the proof of acknowledgment of the annexed instrument, duly authorized to take the same. And further, that I am well acquainted with the handwriting of said Notary, and verily believe the signature to the said certificate, or proof, or acknowledgment, to be genuine. I further certify that said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said Court and County, the 12th day of April, 1892.

[SEAL.]

WM. J. MCKENNA, *Clerk.*

I, Geo. H. Webb, Clerk of the County Court of Jefferson County, in the State of Kentucky, do certify that on this day, at 12:15
9 o'clock p. m., the foregoing articles of incorporation were produced to me, in my office, and that I have recorded them, this and the foregoing certificates, in my said office.

Witness my hand this 15th day of April, 1892.

GEO. H. WEBB, *Clerk.*

STATE OF KENTUCKY, *County of Jefferson, set:*

I, Geo. H. Webb, Clerk of the County Court within and for the State and County aforesaid, do certify that the foregoing five pages contain a true, correct and complete copy of the articles of incorporation and amendments to articles of incorporation *and amendments to articles of incorporation* of the Standard Oil Company, together with the certificates of acknowledgment and records thereof, as the same now appears in corporation book 4, page 70, and corporation book 7, page 543, respectively, of the records in my office as Clerk of said Court.

In testimony whereof I hereunto set my hand and affix the impression of the seal of the Jefferson County Court, of which I am the custodian, at Louisville, Kentucky, this 7th day of September, 1893.

[SEAL.]

GEO. H. WEBB,

Clerk of Jefferson County Court, Kentucky.

STATE OF KENTUCKY, *Jefferson County:*

I, W. B. Hoke, sole and presiding Judge of the County Court within and for the County and State aforesaid, do certify that Geo. H. Webb, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, Clerk of said County, duly elected and qualified, and that all of his official acts as such are entitled to full faith and credit, and that his foregoing attestation is in due form of law.

Given under my hand at the City of Louisville, Kentucky, this 4th day of September, 1893.

W. B. HOKE,

*Sole and Presiding Judge of the
Jefferson County Court, Kentucky.*

STATE OF KENTUCKY, *Jefferson County*:

I, Geo. H. Webb, Clerk of the County Court, within and for the County and State aforesaid, do certify that W. B. Hoke, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, sole and presiding Judge of the said Court, duly elected, commissioned and qualified, and that all of his official acts as such are entitled to full faith and credit.

In testimony thereof, I hereunto set my hand, and affix the official seal of Jefferson County, Kentucky, of which I am the custodian, at Louisville, Kentucky, this 14th day of September, 1893.

GEO. H. WEBB,

Clerk Jefferson County Court, Kentucky.

No. 237. In Chancery.

STATE OF TENNESSEE

versus

STANDARD OIL COMPANY.

Subpoena to Answer. Issued 16th of March, 1907. J. D. G. Morton, Clerk and Master.

(Return.)

Came to hand same day issued, and there being no President, Vice-President, Secretary, Director, or other chief officer of the defendant company to be found in my county, I executed the within process by reading same and leaving a true copy of the bill with W. H. Lane, sub-agent, the chief agent of the defendant company within my county.

This March 19, 1907.

F. E. PATTON, *Sheriff.*

CHAS. T. CATES, JR.,

R. L. PECK,

Solicitors for Complainant.

STATE OF TENNESSEE.

To the Sheriff of Sumner County, Greeting:

We command you to summon the Standard Oil Company, a body politic and corporate under the laws of the State of Kentucky, if to be found in your County, to appear before the Chancellor of the Chancery Court at Gallatin, at the next rule day, to be held in the Courthouse in Gallatin, on the 1st Monday in April next, then and there to answer the Original Bill of Complaint of the State of Tennessee by and upon the relation of her Attorney-General *versus* the Standard Oil Company, and further do and receive what our said Court shall consider in that behalf, and this you shall in nowise omit, under the penalty prescribed by law.

Herein fail not, and have you then and there this writ.

11 Witness J. D. G. Morton, Clerk and Master of our said Chancery Court, at office in the Courthouse at Gallatin, this second Monday in November, 1906, and the 131st year of American Independence.

J. D. G. MORTON,
Clerk and Master.

Demurrer. Filed March 23, 1907. J. G. D. Morton, C. & M.

Rule No. 237 in the Chancery Court of Sumner County, Tennessee.

STATE OF TENNESSEE *ex Relatione*
versus
STANDARD OIL COMPANY.

The Defendant, The Standard Oil Company, demurs to the bill filed against it in this cause on the 16th day of March, 1907, for insufficiency, and it avers and says that the said bill is wholly insufficient in this, namely:

First. The said bill avers that this defendant and other persons therein named, and "perhaps" others unknown, unlawfully made and entered into an arrangement, agreement, and combination, with a view to lessen, and which tended to lessen, full and free competition in the sale of this company's oil; and it also alleges that this defendant company, and the other persons therein named "perhaps" others unknown, entered into certain arrangements, agreements or combinations designed to advance, and which tended to advance the price or cost to the consumer of this company's oils, then being offered for sale at Gallatin; and the said bill then avers that in order to carry out these unlawful arrangements, agreements and combinations, and as a part thereof, these defendants induced certain persons to rescind and cancel certain orders for purchase of oil given by them to the Evansville Oil Company; but the said bill nowhere states the terms or provisions of the agreement, arrangement or combination alleged to have been entered into and made as the law requires to be done in order to oblige this defendant to answer.

Second. The bill fails to show an arrangement, agreement or combination in violation of any act or law of the State of Tennessee, and not an act, if a violation of law at all, in violation of the laws of the United States relating to interstate commerce.

Wherefore, the defendant prays the judgment of the Court, whether, etc.

JOHN J. VERTREES,
W. O. VERTREES,
JAS. W. BLACKMORE,
Solicitors.

12 *Answer. Filed June 6, 1907. J. D. G. Morton, C. & M.*

Rule No. 237, in the Chancery Court of Sumner County, Tennessee.

STATE OF TENNESSEE, Upon the Relation of CHAS. T. CATES, JR.,
Attorney-General of the State of Tennessee,

versus

STANDARD OIL COMPANY.

The answer of the Defendant, the Standard Oil Company (of Kentucky), to the bill filed against it in this cause on the 16th day of March, 1907.

Respondent, the Standard Oil Company, saving and reserving to itself the benefit and advantages of exception by way of demurrer, or otherwise, to the said bill for its deficiencies, for answer to so much thereof as it is advised is material to be answered, says that:

1. It is true, and therefore respondent admits, that it is a corporation organized and existing under the laws of the Commonwealth of Kentucky, with power to deal in illuminating oils, grease, naphtha, gasoline, and the like. It is also true, and therefore respondent admits, that it has been doing business for many years in the State of Tennessee, and that it filed a copy of its charter in the office of the Secretary of State, and has in all respects complied with all the laws of the State with reference to foreign business corporations doing business in Tennessee; and

It is also true, and therefore respondent admits, that for many years it has done business in Sumner County, Tennessee, and that during this time it has had, and now has, a local agent at Gallatin, in Sumner County, Tennessee.

2. It is proper to explain, and therefore respondent says, that it does an extensive business not only in Kentucky, but in Tennessee, and in other States. It has been the custom of the company to conduct its business in a methodical and economical way; and it has divided the territory in which it does business, into districts. A subordinate agent called a "special agent," has charge of a district. The district in which Sumner County, Tennessee, is embraced, includes what is known as East Tennessee, and Middle Tennessee, and portions of Southern Kentucky, and Northern Alabama, and Northern Georgia—the district being organized with a view to the transportation agencies and railways which traverse it. The special agent in charge of this district, during the year 1903, and until about October, 1906, was Mr. J. E. Comer, with his principal office at Nashville, Davidson County, Tennessee. Mr. Comer died in October, 1906.

Gallatin, the county seat of Sumner County, is about twenty-six miles from Nashville, Tennessee, on the Louisville & Nashville Railroad; and it is true, and therefore your respondent admits, that for many years it has had, and during the year 1903, did have, an agent in charge of its station at Gallatin. The agent there during the year 1903 was O'Donnell Rutherford; and such agents are known as "local agents."

Respondent's method of doing business for years in Tennessee has been this: It has established stations and agencies at the principal towns; and it has been its custom to store thereat, in large iron tanks called "storage tanks," the oil which it keeps for sale. The oil is brought from refineries in other States to these stations by rail, in large iron tanks, called "car-tanks." The oil is drawn from the car-tanks into the storage tanks at the stations, and from these it is drawn into iron tanks mounted on wagons, called "tank-wagons," for delivery by means of these tank-wagons, to the customers and patrons of the company. These tank-wagons deliver the oil to merchants, the customers of the company, as ordered, and in such quantities over twenty gallons as may be desired. The oil in this way is delivered to the company's said customers at a great distance, even as far distant as twenty miles from the station or town.

Respondent says that its system of doing business and serving its customers in this way has been established at great expense, and that it is superior to all others, in this: it enables its customers to obtain oil either in large or small quantities, as may be desired; it gives them full measure, inasmuch as the oil is drawn and measured right at the customers' doors; the oil is delivered, thus saving inconvenience and cartage expense to the customers; and there are no barrels to leak in handling and while stored. This method of doing business is expensive to the company, but of advantage to customers, and, upon the whole, of advantage to the company; but the initial outlay is such that competitors of this respondent in Tennessee, while they have been driven to adopt the wagon-tank delivery system in order to compete, have, up to this time, limited their operations by these methods to the principal cities of the State, and have not gone to the expense of establishing such stations throughout the State, at and in the smaller towns, as this respondent has done. One result has been that respondent has a larger custom throughout the State than any of its competitors.

Respondent then had, and it still has, a station at Gallatin, in Sumner County, Tennessee. It has there a lot of land which it has purchased, storage tanks of iron, and iron tank-wagons; and it was and still is accustomed to deliver oil from its wagons to country merchants as far distant from Gallatin as twenty miles. No competitor has ever attempted to establish a similar plant, or to do business upon these principles, at Gallatin, Tennessee.

14

II.

3. Respondent now further shows and says that while it was conducting its business in this way, having in all respects complied with the laws of Tennessee, and paid all taxes which it believed to be due, or which had been demanded of it as a dealer in oils, on or about the 5th day of October, 1903, as respondent was subsequently informed, and now says is true, one Claude Rosemon, an agent or traveling salesman of a corporation engaged in the oil business, known as the Evansville Oil Company, appeared at Gallatin, Tennessee, for the purpose of making sales of oil to the merchants at that place. The Evansville Oil Company is a corporation organized

and existing under the laws of the State of Indiana, with power to deal in oils, and was located and doing business at Evansville, in that State. It was a branch or sub-station, of another corporation of the same kind, but larger, known as the Independent Refining Company, located at Oil City, Pennsylvania, at which place the oils, which the Evansville Oil Company was proposing to sell, as your respondent is informed and believes, and says to be true, were manufactured or refined by the Independent Refining Company, a corporation organized and existing under the laws of the State of Pennsylvania, and located and doing business in that State. Neither of said corporations has done business, or had an agency, in Tennessee.

On or about the 5th day of October, 1903, the said Rosemon took orders from various merchants of Gallatin, Tennessee, as purchasers for oil in barrels, sold and to be delivered by him to them. He took orders in all for sixty-two barrels of oil—the orders ranging from three to ten barrels each—and the oil was to be shipped from Oil City, Pennsylvania, via Cairo, Illinois, and to be delivered to these purchasing merchants at Gallatin about November 1, 1903. The oil was bargained, and was to be delivered, in wooden barrels, at the price of $14\frac{1}{2}$ cents per gallon.

The statement in the bill that respondent was selling oil in Gallatin at that time at $13\frac{1}{2}$ cents per gallon is true, but the statement in the bill that respondent's oil was of an inferior grade and quality, is wholly untrue. Respondent was selling oil at that time of a good grade and fine quality, and it was of the same grade and quality as that which your respondent was selling throughout the territory in which it does business, and particularly throughout the entire Nashville district.

4. Respondent believes it to be true, and therefore admits, that its special agent, Mr. Comer, at Nashville, was informed in some way of the fact that Mr. Rosemon had visited Gallatin for the purpose of taking orders or making sales; but he did not know the success of Mr. Rosemon's visit—that is, whether he had placed any orders or not.

15 C. E. Holt was a traveling salesman in the service of this company's Nashville agency, or office, and about the 8th or 10th of October, 1903, Mr. Holt, who was then at Monterey, Tennessee, traveling for the company, was informed by Mr. Comer of the fact that said Rosemon had visited Gallatin; and he directed Mr. Holt to go to Gallatin and ascertain what had been done, for the purpose of looking after his trade; for the trade at Gallatin had been one of value to respondent, and it had put itself to great expense in establishing the station, wagons, etc., to accommodate that trade. Mr. Comer did not authorize, or direct, or order, Mr. Holt to proceed to Gallatin and effect a countermand of the orders which the Gallatin merchants had given to Mr. Rosemon by gifts of oil, as charged in the bill; neither had any agent of the company authorized or directed him so to do. Respondent says that it had not been conducting business in that way in the State of Tennessee, and that it had never done anything of the kind, nor had its agent, Mr. Comer, ever directed anything of the kind to be done, in any part of Tennessee.

Mr. Holt was a traveling salesman with authority to look after the local agents; that is to say, see what they were doing, and to report; but he had no authority whatsoever to fix the price of oil, nor to sell it at any other price than that at which he was directed to sell it through the Special Agent, nor to give away oil, nor to control the local agents in any way.

On or about the 12th day of October, 1902, Mr. Holt arrived at Gallatin, and upon inquiry ascertained that Mr. Rosemon, on his said visit to Gallatin, had taken orders from merchants of that place who were his regular customers, for the purchase and delivery of coal oil in barrels. He was informed that merchant S. W. Love had ordered ten barrels, merchant W. H. Lane had ordered five barrels, merchant J. E. Cron had ordered ten barrels, and merchant L. C. Hunter had ordered five barrels.

Respondent was not then, but is now informed, and believes it to be true, that Mr. Holt approached these merchants to induce them to countermand the orders they had given to Mr. Rosemon, and to that end explained to them how they had been his customers; that the oil of this respondent was as good as Mr. Rosemon's; that it was of great advantage to them to buy from this respondent by reason of the fact that they could buy in any quantity (over twenty gallons) and have it delivered from the wagons, at their doors, and would not be obliged to keep it in wooden barrels and suffer leakage and loss—as would be in the case of the oil ordered from Mr. Rosemon; respondent admits that Mr. Holt endeavored, by arguments of this kind, to induce them to countermand the order which they had given. Respondent is now, but was not then, informed, and believes

16 it to be true, that not having succeeded with these arguments, he, and the local agent, O'Donnell Rutherford, as an inducement, also offered and agreed to *give* them oil; that is to say, to give to Mr. Love and Mr. Cron (who had ordered ten barrels each) 100 gallons of oil each, and to Mr. Hunter and Mr. Lane (who had ordered five barrels each) fifty gallons each, if they would countermand their said orders; and it admits that thereupon these merchants accepted these offers, and agreed to countermand them, and that they thereupon did telegraph immediately to the Evansville Oil Company, at Evansville, Indiana, countermanding their orders. Said S. W. Love telegraphed as follows:

"Kindly countermand my order for ten barrels of oil.

"S. W. LOVE."

The other countermanding orders were similar to this.

Respondent says that these telegrams were sent, and this agreement made that they should be sent, on the 12th day of October, 1903, and they were received by the Evansville Oil Company before the oil had been started from the point in Pennsylvania from which it was to be shipped. Respondent further says that it was the established and well-known custom of the trade at Gallatin, and throughout the entire territory, to permit orders given by a merchant to be countermanded at any time before the oil should be shipped out or started on its way, and that this usage and custom was well known to

and understood by all the parties concerned—the Evansville Oil Company, Mr. Rosemon, Mr. Holt, and the said merchants of Gallatin. Respondent further says that the said countermanding orders were received on that day by the Evansville Oil Company, before the oil was shipped, and they were accepted and acquiesced in by them, and not objected to, because of the existence of said custom and usage.

5. Nevertheless, a car load of seventy-two barrels of oil was subsequently shipped from Pennsylvania by the Evansville Oil Company to Gallatin, Tennessee, although it had taken orders for only sixty-two barrels thereof, and orders for thirty of said barrels had been countermanded. Ten barrels that had not been sold to any one, or ordered by any one, were shipped in the said car, to be sold at Gallatin, Tennessee, and were sold there by said company. The said Evansville Oil Company, through its agents, falsely represented to the taxing authorities at Gallatin that all the said oil so shipped in said car had been ordered, and had been shipped upon purchase orders—well knowing the representation to be false and untrue, and marking it to avoid the payment of the taxes required by the laws of Tennessee to be paid by persons selling oil under such circumstances in Tennessee.

17 The fact that the said four orders had been procured to be countermanded by gift of oil was concealed from this respondent company, and from its Special Agent, Mr. Comer, and was known only to the said Holt and the said Rutherford, mere subordinate employees, without authority to make contracts for the company of any other kind than sales of oil at the prices fixed by or through the Special Agent at Nashville. The first knowledge that the respondent company had thereof, came to its Special Agent, Mr. J. E. Comer, at Nashville, about the 23d day of December, 1903, from said Rutherford, and immediately he disapproved of the transaction, reprimanded said Rutherford and Holt, and deducted \$40.50, the value of said oil, from the monthly salary of Mr. Rutherford, the local agent, who had delivered the 300 gallons of oil to the said merchants, and in this way made him refund to the company, and pay for the same. The managing officers of this company had no knowledge of these transactions until informed thereof by said Comer; and he had no knowledge thereof until December 23, 1903.

Respondent has now stated fully and in detail the transactions which are attempted to be made an illegal and criminal agreement, or combination, by the bill filed in this cause.

6. Respondent says there is no other foundation for the charge made against it in this bill; that the facts are as stated above, and that these are all the facts in the case. Respondent denies that the transaction, or conduct, or facts hereinbefore stated, constitute any offense whatsoever against the laws of the State of Tennessee, and particularly against the statute which is chapter 140 of the Session Laws of 1903 of the State of Tennessee, upon which these proceedings are based.

7. Respondent denies that it ever at any time, through any agent, having authority, or not having authority, made and entered into any

arrangement, agreement or combination with said C. E. Holt, O'Donnell Rutherford, S. W. Love, W. H. Lane, J. E. Comer, L. C. Hunter, or any of them, which was criminal or unlawful, or in violation of any of the laws of the State of Tennessee, and particularly of the said statute of 1903 hereinbefore mentioned; and respondent denies that as a part of any unlawful arrangement, agreement, or combination, it, or said Holt, or said Rutherford, or said Comer, or any one else in the service of this company, gave, or offered to give, oil to the said merchants above named; and respondent denies that that which the said Holt and the said Rutherford did (and which is related above) constituted an unlawful criminal agreement, or combination, or arrangement.

Respondent further says that if the said transactions of the said Rutherford and the said Holt, or either of them, or the acts of the said Comer, constituted an unlawful and criminal agreement, arrangement, combination or understanding, that this respondent is not bound or incriminated thereby. No officer of this company who manages and directs, or controls, its affairs had any knowledge thereof, or at any time gave any directions or orders for it to be done, or approved thereof.

Respondent has done business in Tennessee for many years. It has invested, in this State, large sums of money in stations, warehouses, tanks, tank wagons, and teams; more than \$200,000, in all, as follows:

Number of Stations in the State of Tennessee.....	57
Number of Counties in which located.....	53
Number of Tank Wagons.....	69
Value of Tank Wagons, Vehicles and Animals.....	\$35,500 00
Value of all other property (excepting stock of merchandise)	166,400 00
Amount paid for licenses in 1906.....	8,500 00
Amount paid for taxes in 1906.....	2,400 00
Inspection fees paid in Tennessee in 1906.....	39,000 00

During all the years that it has done business in said State, it has not ordered, or caused, the orders of its competitors to be countermanded by gifts of oil, neither have any such gifts been made by any of its agents, other than the gifts hereinbefore mentioned; and these were made on the 12th day of October, 1903, without its knowledge or consent. Respondent is informed and believes, and thereupon says, that the said Rutherford and the said Holt had never done anything of the kind before; neither has either of them done anything of the kind since, as respondent is informed and believes and says.

III.

8. And now respondent further answering says, that while it denies that the transactions complained of in the bill, or the things therein alleged to have been done by this respondent, through its said agents, or any of them, constitute an unlawful agreement, or understanding, or combination, or conspiracy, within the meaning

of the laws, particularly the anti-trust laws of the State of Tennessee, or of the United States, that if it be mistaken in this statement, the combination, agreement, conspiracy, or understanding, is not one which violates any law of the State of Tennessee, but is one affecting and in violation of the laws of the United States, relating to interstate commerce; that it was in violation of the laws of the Congress regulating interstate commerce, and not the laws of Tennessee relating to or regulating intrastate commerce.

9. The Evansville Oil Company, a corporation located and doing business at Evansville, Indiana, and not in Tennessee, through its traveling salesman, said Rosemon, took orders from said merchants, citizens of Tennessee, at Gallatin, Tennessee, for the delivery of oil refined by a Pennsylvania corporation and then in the State of Pennsylvania, and for delivery to Tennessee merchants at Gallatin, in the State of Tennessee. The acts complained of, and the only acts complained of, are the acts of said Holt and Rutherford in inducing the said Gallatin merchants, Love, Cron, Hunter, and Lane, by gifts of oil to countermand the said orders which they had given for oil, as heretofore explained, to the Evansville Oil Company. If these acts be offenses at all, they are offenses against interstate commerce, and this court has no jurisdiction or authority to deal with or punish for the same; and the said statute of 1903, under which these proceedings were instituted, has no application, and cannot be enforced against this respondent.

IV.

10. The said alleged agreement or transaction set forth in the bill and alleged to be unlawful, took place, or was engaged in, at Gallatin, Tennessee, on or about the 12th day of October, 1903, and not later nor elsewhere. At that time, and continuously ever since, this respondent had, and has had, an agent located and doing business at Gallatin, Tennessee, known as its "local agents," through whom it could be served with legal process, and which agent is the agent upon whom the subpoena to answer was served as respondent's agent in this case. And throughout the same period it has had, and still has, an Agent, located at Nashville, in Davidson County, Tennessee.

By the laws of Tennessee, in force continuously ever since and before the year 1903, a corporation is a "person" within the meaning of all the laws of the State known as the statutes of limitations, and within the meaning of the laws of the State relating to natural persons, saving and excepting the cases in which it is otherwise expressly provided or prescribed. By the said laws, two or more persons who combine or conspire to commit any offense injurious to intrastate trade or commerce, are guilty of an offense known as conspiracy; and this offense, unless it be otherwise expressly prescribed and provided, is a misdemeanor, and not a felony.

The offense alleged against this respondent and charged to be unlawful in the bill, is alleged to have been one in violation of the Act of the General Assembly of Tennessee, passed March 16, 1903, and known as chapter 140 of the Acts of 1903. Said act, chapter 140,

provides and declares that any and all agreements, combinations and contracts in violation of the provisions of said act, shall be unlawful and void, and be *conspiracies against trade*; also that it shall be the duty of the circuit and criminal courts of this State, specially to instruct the grand juries thereof as to the provisions of said act.

20 Said act further provides that natural persons guilty of committing any such conspiracy, shall be punished by fine or imprisonment in the penitentiary, or both; and that foreign corporations guilty thereof shall be prohibited from doing business in Tennessee, and domestic corporations be dissolved; and it directs the attorney-general of the State to enforce its provisions against offending corporations by due process of law.

11. Respondent now further pleads and says that imprisonment in the penitentiary is not, by the terms of said act, imposed upon any foreign corporation, and therefore not upon this respondent, as a penalty for violating its provisions, nor is it possible to be; but the said act provides that every such violation is unlawful, and calls such violation, and denounces it as, a conspiracy. Respondent says that by virtue of the provisions of the Code of Tennessee, and the said Act of 1903, and of the laws of Tennessee, this respondent, if guilty of the offense in the bill charged (which is denied), is guilty of a *conspiracy* against trade or commerce. That is to say, this respondent if guilty at all, is guilty of a misdemeanor merely, and not of a felony. Said misdemeanor or alleged offense was committed, if committed at all, in October, 1903, and every prosecution, suit, action, and proceeding of and by the State of Tennessee, or its officers, to enforce said law against it, or to punish it under the laws of Tennessee, by indictment or by presentment, or by bill in equity to oust it from the State of Tennessee, and every other form of proceeding for, or on account of the alleged unlawful acts or combinations and agreements, or transactions, in the bill set forth, and particularly the present proceeding against this respondent, are barred by the statute of limitations, particularly by the statute of limitations of one year; and respondent now and here, specially and expressly relies upon, sets up, pleads, and interposes the statutes of limitations, particularly the said statute of one year, as a bar and defense against this present action and proceeding.

12. Respondent further answering says, that the acts set forth in the bill and alleged to be unlawful, were committed in October, 1903, and this present proceeding was instituted on the 16th day of March, 1907; and that by the laws of this State in force in October, 1903, and continuously ever since, known as the statutes of limitations, this suit or proceeding is barred; and respondent here and now sets up, pleads, relies upon, and interposes the same as a bar and defense to the present action or proceedings.

V.

13. Respondent now further shows and says that on the 17th day of May, 1904, the grand jury for Sumner County, in the State of Tennessee, having theretofore been duly and regularly impanelled by and for the Circuit Court of said county, then in regular session, duly returned into said court an indictment

against this respondent and its said agents, Holt and Rutherford, as defendants, wherein and whereby it was charged that they had unlawfully conspired together, and agreed with one S. W. Love, to destroy full and free competition in the sale of coal oil in this State, and that in furtherance of said conspiracy, they, the defendants in said indictment named, had then and there conspired with said Love to give him 100 gallons of oil to countermand his said order of purchase given to the said Evansville Oil Company, and that he agreed to and did countermand the same in consideration of the said gift of oil to him; and

On the same day, the said grand jury duly returned into the said court another indictment against this respondent and its agents, said Holt and Rutherford, as defendants, wherein and whereby it was charged that they had unlawfully conspired together and agreed with one J. E. Cron to destroy full and free competition in the sale of coal oil at Gallatin, in said State, and that in furtherance of said conspiracy, they, the said defendants, then and there conspired with said Cron to give him 100 gallons of oil to countermand his said order of purchase, given to the Evansville Oil Company, and that he had agreed to, and did, countermand the same, in consideration of the said gift of oil to him; and

On the same day, the said grand jury duly returned into said court another indictment against this respondent and its said agents, Holt and Rutherford, as defendants, wherein and whereby it was charged that they had unlawfully conspired together, and agreed with one W. H. Lane to destroy full and free competition in the sale of said coal oil in this State, and that in furtherance of said conspiracy, they the said defendants, then and there conspired with said W. H. Lane to give him fifty gallons of oil to countermand his said order of purchase given to the Evansville Oil Company, and that he had agreed to, and did, countermand the same in consideration of said gift of oil to him; and

On the same day the said grand jury duly returned into said court another indictment against this respondent and its said agents, Holt and Rutherford, as defendants, wherein and whereby it was charged that they had unlawfully conspired together and agreed with L. C. Hunter & Co. to destroy full and free competition in the sale of said coal oil in this State, and that in furtherance of said conspiracy, they, said defendants, had then and there conspired with the said Hunter & Co. to give them fifty gallons of oil to countermand an order of purchase given by them to the Evansville Oil Company, and that they had agreed to, and did, countermand the same in consideration of said gift of oil to them; and

14. By regular process, respondent, and said Holt and Rutherford, were brought before said Circuit Court of Sumner
22 County for trial upon the first mentioned of the said indictments, and they were arraigned thereon on the 20th day of September, 1904, and then and there pleaded "not guilty." At the September term, 1904, of the said court, respondent, and its said agents, Holt and Rutherford, were put upon trial, under the said indictment returned in the case of S. W. Love, and on the 22d

day of September, 1904, the jury impanelled in said cause returned into said court the verdict that said Rutherford was not guilty, and that this respondent and said Holt were guilty, and that a fine of \$5,000 be assessed against this respondent, and a fine of \$3,000 be assessed against said Holt; and judgment was then and there rendered by said court upon the said verdict accordingly; and

From that judgment respondent and said Holt prosecuted an appeal, in the nature of a writ of error, to the Supreme Court of Tennessee, held at Nashville, and on the 16th day of March, 1907, the said judgment was, by the judgment of the Supreme Court of Tennessee, affirmed as to said Holt, but reversed as to this respondent; and by said judgment the said indictment was then quashed and dismissed, for that (it was *held*) respondent, *being a corporation*, could not be indicted under the said act, chapter 140, of the Acts of 1903, upon which its said conviction had been had was based. This respondent did not at any time in any court move to quash the said indictment, or any of said indictments, upon the ground above mentioned.

15. On the 28th day of May, 1907, the said other three cases being called for trial at the May term, 1907, of the said Circuit Court of Sumner County, Tennessee, the said indictments were all dismissed by the State of Tennessee (through its Attorney-General) as to this respondent and the said Rutherford, and the said Holt put upon his trial thereunder; and a verdict was then rendered in the said cases that he was guilty as charged, and that he should pay a fine of \$100 and the costs in each of said cases; and judgments were then entered thereon by said court in the said cases accordingly.

16. Respondent now further answering says that the offense wherewith it now stands accused and charged, by and in the bill in this cause, is a *criminal charge* within the meaning of the Constitution of this State; and of the said act, which is chapter 140 of the Acts of 1903; and respondent says that it cannot be put to answer, or be proceeded against, otherwise than by indictment or presentment, and a trial by jury in a court of law as in the case of other criminal charges; and, that only after indictment or presentment and a trial thereon by a jury and a verdict of "guilty" and judgment thereon against this respondent, can a foreign corporation or a domestic corporation be proceeded against by the Attorney-General

of Tennessee, or by a bill in equity upon his relation, or other
23 proceeding, to prohibit it from doing business in Tennessee, or to oust it from this State; and

No verdict, or judgment of conviction, under or upon any presentment or indictment, has ever been rendered or pronounced against it by any court or jury in this State for having committed the alleged unlawful conspiracy, or offense set forth and shown in the bill; and respondent now pleads, relies upon, and sets up a defense, that for the reasons, and because of the facts, hereinbefore set forth and shown, this court has no jurisdiction or authority to render a decree in this cause prohibiting it from doing business in this State, or ousting it therefrom.

VI.

17. The charge in the bill when this respondent had succeeded by means of the alleged criminal agreement in destroying free competition in the sale of its oil then stored at Gallatin, Tennessee, respondent immediately advanced the price of that oil (of inferior grade) from $13\frac{1}{2}$ to $14\frac{1}{2}$ cents per gallon, is not true. The prices at which respondent's oils are from time to time sold are determined by the managing agents of the company according to conditions, such as supply, the demand, location, transportation rates, and the like, with the result that they vary according to the location of towns, and the different railways upon which they are situated. Among those which may be taken to show respondent's course of business are Nashville, Gallatin, Springfield, and Murfreesboro, which are situated on different railway lines, and are all in Middle Tennessee, near Nashville. Oil was sold by this respondent in Middle Tennessee, at the towns above mentioned, during the years 1903-4, at the times and for the periods of time, and at the prices, and none other, now stated, namely:

	1903. June 5.	1903. Oct. 27.	1904 March 8.
<i>Nashville—</i>			
Tank Wagon	$12\frac{1}{2}$ c.	14c.	$13\frac{1}{2}$ c.
Barrels	15c.	$16\frac{1}{2}$ c.	$16\frac{1}{2}$ c.
<i>Gallatin—</i>			
Tank Wagon	$13\frac{1}{2}$ c.	$14\frac{1}{2}$ c.	14c.
Barrels	$15\frac{1}{2}$ c.	$16\frac{1}{2}$ c.	16c.
<i>Springfield—</i>			
Tank Wagon	14c.	15c.	$14\frac{1}{2}$ c.
Barrels	16c.	17c.	$16\frac{1}{2}$ c.
<i>Murfreesboro—</i>			
Tank Wagons	14c.	$15\frac{1}{2}$ c.	15c.
Barrels	16c.	$17\frac{1}{2}$ c.	17c.

24 In the above table, the prices stated are that many cents per gallon.

The alleged conspiracy or combination to advance the price of the oil which respondent then had at Gallatin, Tennessee, was made, it is charged, on the 12th day of October, 1903. As above shown, the price of oil was advanced one cent per gallon at Gallatin, October 27, 1903, and held and sold at that price until the 8th day of March, 1904, when it was reduced; but it is also true, as respondent now shows and says, that the price of oil was advanced at the same time that it was advanced at Gallatin, at the other towns above mentioned. The same advance was made at Springfield as was made at Gallatin, and a higher advance was made at Nashville and Murfreesboro than at Gallatin. Wherefore this respondent says, and it is true, that the action of said agents at Gallatin, and the alleged "combination" then made, did *not* influence, and could not have in-

fluenced, the advance in price which was made at Gallatin in October, 1903, in the least. No controlling agent or manager of this respondent company had any knowledge or information that said gifts of oil had been made at Gallatin until December 23, 1903, long *after* said advance in price had been made, the first knowledge thereof being that communicated by the said Rutherford to J. E. Comer, local agent, at Nashville, Tennessee, on the 23d day of December, 1903.

It is not true that the oil sold by this respondent at Gallatin was inferior oil. It was tested, fire-proof oil, of excellent burning and lighting quality.

Respondent has no knowledge of the comparative qualities of its said oil and of that then offered and sold by the Evansville Oil Company, and therefore respondent can neither admit nor deny that the said oil was superior to its own; but respondent says that the said oil ought to have been superior, as it was sold at a higher price per gallon than respondent was demanding for its oil at that time, as the market then stood.

VII.

18. Respondent now also further answers and says that the said indictments against it were authorized, and the said State court had jurisdiction to put your respondent on trial thereunder to answer said charges, and that it did put respondent on trial in the case hereinbefore called Love's Case, and put it in jeopardy by the said trial; and respondent says that it cannot now by proceedings in the present form (that is, the bill in this case) be again held to answer the said charge; and it here and now pleads and relies upon the said defense of former acquittal.

25

VIII.

19. Respondent denies that it has violated the laws of Tennessee as alleged in the bill. It denies that the acts therein set forth and alleged were unlawful. It says that the acts alleged and the acts really done by it, as shown hereinbefore, are transactions affecting and relating to interstate commerce, exclusively and wholly beyond the power or authority of the State of Tennessee to regulate, or punish or control, and the said act, chapter 140 of the Acts of 1903, in so far as it assumes to so do, is void, for it is in violation of the Constitution of the United States; and respondent here and now sets up, pleads and relies upon that defense.

IX.

20. Respondent further says that the said act, which is chapter 140 of the Acts of 1903, cannot authorize or support the proceedings in this cause, for that if it does, it denies to this respondent the equal protection of the laws, and a trial according to the laws of the land; it denies to respondent a trial by jury under an indictment or presentment—the only mode in which it can be put to answer a criminal charge.

Therefore respondent says that the said act is void and this bill based thereon ought to be dismissed.

X.

21. Every allegation in the bill not hereinbefore expressly admitted, is now and here denied.

Having fully answered, respondent prays to be hence dismissed, with its reasonable costs in its behalf expended.

It has caused its name to be subscribed hereto by its Vice-President, he being duly authorized so to do; and its seal to be affixed by its Secretary, he being duly authorized to affix the same.

[SEAL.] By H. G. WESTCOTT,
 Vice-President,
 By CHARLES T. WHITE,
 Secretary.

JOHN J. VERTREES,
 JAMES W. BLACKMORE,
 WILLIAM O. VERTREES,
 Counsel.

26 *Amended and Supp. Bill. Filed November 14, 1907. J. D. G. Morton, Clerk and Master.*

Rule No. 237.

To the Honorable J. W. Stout, Chancellor, Holding the Chancery Court of Sumner County, at Gallatin, Tennessee:

STATE OF TENNESSEE *ex Rel.* ATTORNEY-GENERAL
 versus
 STANDARD OIL COMPANY OF KENTUCKY.

The amended and supplemental bill of the State of Tennessee, by and upon the relation of her Attorney-General, filed, by leave of court, in the above entitled cause in Your Honor's court at Gallatin, Tennessee, against the Standard Oil Company, a body politic and corporate under the laws of the State of Kentucky, defendant in the above entitled cause.

Complainant, State of Tennessee, shows unto Your Honor:

I.

That on March 16, 1907, she filed her original bill in Your Honor's court at Gallatin against the defendant, Standard Oil Company (of Kentucky), showing and alleging, among other things, the following:

First. That the defendant, Standard Oil Company, is a corporation originally chartered and organized under the laws of the State of Kentucky, and since 1893 has been claiming the right to do, and has been doing, business in the State of Tennessee, after having filed a copy of its charter in the office of the Secretary of State of complainant State of Tennessee, on September 21, 1893; a duly certified copy of which is herewith filed as Exhibit A to this bill, but

need not be copied in issuing process. Said defendant was, at the time of the matters hereinafter shown, and still is, doing business in Sumner County, Tennessee, and has a local agent residing at, in or near the town of Gallatin, in said Sumner County.

Second. Complainant further shows and avers that in 1903, the defendant, Standard Oil Company (for convenience hereinafter referred to as defendant company), was engaged in and carrying on the business in Sumner County, and in Tennessee generally, of a dealer in coal oil and other products of petroleum, which were and are commonly used for illuminating and other purposes, which it sold both to retail dealers and the public generally. The business of defendant company in the greater part of Tennessee, including Sumner County, was under the management and control of one J. E. Comer, whose headquarters or offices were at Nashville, in Davidson County, Tennessee, and the local agent having in charge the

27 business of said company at or near Gallatin, Tennessee, was one O'Donnell Rutherford, and there was also employed in and about the business of defendant company one C. E. Holt, who was styled a "salesman," but who had charge, under the general supervision of said Comer, of the local agents and agencies of said company, inspecting the same and giving directions and instructions thereto. The said Comer, as special or managing agent, and the said Holt acting under him, were authorized by defendant company to do, and in fact did, whatever in their judgment was necessary to advance the interests of their employer.

Complainant further shows that the oil for illuminating and other purposes handled, sold and dealt in within the State of Tennessee, and imported and brought into said State from other States, and then stored in large iron tanks located at places where defendant company established local agencies, and from said tanks, usually called storage tanks, said oils were offered for sale and sold to retail dealers and oftentimes to the public generally. Defendant company had one of its storage tanks located at Gallatin, and from this tank it supplied the demand for oil at Gallatin and at other places in Sumner County.

Third. Complainant further shows and avers that prior to October, 1903, defendant company had succeeded in pre-empting and securing for itself the oil business in Sumner County, and had succeeded in preventing other dealers from coming in competition with its said business in Sumner County, and at said time, to wit: in October, 1903, was engaged in selling in Sumner County an inferior grade of oil at the price of 13½ cents per gallon.

Complainant further shows that thus matters stood in relation to the oil business carried on by defendant company at Gallatin, when, on or about October 5, 1903, one Claude Roseman, an agent or traveling salesman of the Evansville Oil Company, whose chief office was at Evansville, in the State of Indiana, and which was engaged in the business of selling, among other things, illuminating oils, went to Gallatin, in Sumner County, Tennessee, and offered for sale to certain retail dealers at that place a superior grade of oil in competition with the oil of defendant company, then stored in its tanks at Gallatin, or which was being offered for sale at that place, and the

said Rosemon succeeded in securing from certain customers of defendant company orders for about sixty barrels of oil at the price of 14½ cents per gallon, to be shipped from Oil City, Pennsylvania, and delivered in original packages to said persons giving said orders about November 1, 1903. Among others, said Roseman secured an order from one S. W. Love for ten barrels of oil; from one W. H. Lane an order for five barrels of oil; from one J. E. Cron an order for ten barrels of oil, and from one L. C. Hunter an order for sixty barrels of oil.

28 Thereupon, information having come to defendant company that said Evansville Oil Company had secured orders for oil from and sold oil to, its customers at Gallatin, as hereinbefore shown, and was thereby and in that manner competing with the oil business of defendant company at Gallatin, the said defendant company, and its said agents, J. E. Comer, C. E. Holt and O'Donnell Rutherford, and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, unlawfully made and entered into an arrangement, agreement and combination, with a view to lessen, and which tended to lessen, full and free competition in the sale of defendant company's oil then being sold or offered for sale at Gallatin, and the said defendant company and its said agents, Comer, Holt and Rutherford, and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, entered into and made certain unlawful arrangements, agreements or combinations, which were designed to advance, and which tended to advance, the price or cost to the purchaser or consumer of defendant company's said oil then being sold or offered for sale at Gallatin, as aforesaid.

And complainant further shows unto your Honor that, in order to carry said unlawful arrangements, agreements or combinations into effect, and as a part of such unlawful arrangements, agreements or combinations, the said defendant company and its said agent, C. E. Holt, induced the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, to rescind and cancel their several purchases of oil or orders for oil from said Evansville Oil Company, and as a consideration or inducement for said rescissions or cancellations, and as a part of said unlawful arrangements, agreements or combinations, said defendant company gave without cost or charge to the said S. W. Love one hundred gallons of oil, and to the said W. H. Lane fifty gallons of oil, to the said J. E. Cron one hundred gallons of oil, and to the said L. C. Hunter fifty gallons of oil; and, at its own expense, sent telegrams, in the name of said Love, Lane, Cron and Hunter, to said Evansville Oil Company, cancelling the orders of said parties.

Complainant further shows unto your Honor that the said Love and others named above not only rescinded and cancelled, in the manner and as above shown, their several orders given to the Evansville Oil Company as aforesaid, but that they refused to accept or receive said oil when the same was shipped to Gallatin. So that the said Evansville Oil Company was driven from the field as a competitor with defendant company in the oil business at Gallatin, and thereupon defendant company, having succeeded, by means of and

through the aforesaid unlawful agreements, arrangements or combinations, in not only lessening, but destroying, full and free competition in the sale of its oil then stored at Gallatin and being offered for sale, immediately advanced the price of its oil, which was of an inferior grade, as hereinbefore shown, from 13½ cents per gallon to 14½ cents per gallon, the price at which the said Evansville Oil Company had offered for sale and had sold a grade of oil far superior, as complainant is informed and believes, to the oil sold by defendant company.

So that complainant avers and charges that the unlawful arrangements, agreements or combinations, made and entered into between the defendant company and its said agents, Comer, Holt and Ruthersford, and the said Love, Lane, Cron and Hunter, as hereinbefore shown, were not only made with a view of lessening full and free competition in the sale of defendant's oil at Gallatin, but that in fact said unlawful arrangements, agreements or combinations naturally tended to and did result in lessening and destroying full and free competition in defendant's said oil at Gallatin, and naturally tended to and did result in advancing the price or cost of said oil to defendant's customers and the consumers of said oil in and about Gallatin, and in Sumner County, Tennessee.

Therefore, complainant charges that defendant company, a foreign corporation as aforesaid, has, in the manner hereinbefore set out, violated the provisions of section 1 of chapter 140 of the Acts of the General Assembly of 1903, and this bill is brought by the complainant, through her Attorney-General as aforesaid, in order that the punishment for such violations prescribed by section 2 of said act may be imposed upon said defendant company, to wit: that said defendant company be denied the right to do so, and be prohibited from doing, business in this State.

Fourth. And thereon complainant prayed, in substance, that the said Standard Oil Company be made a party and required to answer, and for a decree enforcing the provisions of chapter 140 of the Acts of 1903, particularly the second section of said act, against said defendant, to the end that it be denied the right to do, and be ousted from doing, business within this State, and to the end that such decree be made effectual, that the license of said defendant to do business in this State be cancelled, and that its officers, agents, employees and all persons acting for it, be perpetually enjoined from doing or carrying on its business in this State; and for all such interlocutory orders and decrees as might become necessary during the progress of this cause, and for general relief.

II.

That process as prayed in said bill was duly served upon an agent of defendant, Standard Oil Company, and defendant entered its appearance and filed a demurrer challenging the legal sufficiency of the averments of said original bill, but said demurrer was overruled by your Honor at the May term, 1907, and defendant allowed time within which to file an answer; whereupon, on the 6th day of June, 1907, the defendant filed its answer,

admitting that it is a corporation chartered and organized under the laws of the State of Kentucky; that at the date of the transactions complained of in the bill it was and still is a dealer in oils and the products of petroleum, at Gallatin, in Sumner County, Tennessee, but denied that it had in any manner entered into any agreement of conspiracy in restraint of trade, or that it had violated the provisions of chapter 140 of the Acts of 1903, as charged in the bill, and set up, plead and relied upon, as averred in said answer, "the statute of limitations, particularly the said statute of one year, as a bar and defense against this present action and proceeding."

And in and by its said answer, defendant Standard Oil Company further showed and averred that at the May term, 1904, of the Circuit Court of Sumner County, it, along with two of its agents, C. E. Holt and O'Donnell Rutherford, was indicted upon a charge of having unlawfully conspired together and agreed with one S. W. Love to destroy full and true competition in the sale of oil in this State, and that, in furtherance of said conspiracy, they, the defendants in said indictment named, had then and there conspired with said Love to give him one hundred gallons of oil to countermand his order of purchase given to the agent of the Evansville Oil Company for ten barrels of oil, and that thereupon the said Love did agree to, and did countermand the said order, in consideration of said gift of oil; and also setting forth that at the same term of said Circuit Court, the defendant, Standard Oil Company, and said Holt and Rutherford, were also indicted for and on account of their transactions with J. E. Cron, W. H. Lane and L. C. Hunter; and that said defendant, Standard Oil Company, and said Holt and Rutherford, were tried upon the Love indictment at the September term, 1904, of said court, and while the said Rutherford was acquitted, the defendant Standard Oil Company, and said Holt, were found guilty and a fine of \$5,000 assessed against defendant oil company and a fine of \$3,000 assessed against said Holt, and from the judgment entered thereon the said defendant oil company and Holt appealed to the Supreme Court of Tennessee, sitting at Nashville, where, in due course, the case was heard, and on the 16th day of March, 1907, the judgment of the Circuit Court of Sumner County was, by the Supreme Court, affirmed as to said Holt, but reversed as to defendant, Standard Oil Company, because, as held by said Supreme Court of Tennessee, defendant oil company being a corporation, could not be indicted under section 3 of chapter 140 of the Acts of 1903, and for

31 this reason the indictment as to said defendant oil company was quashed; that thereafter the other indictments which were still pending in the Circuit Court of Sumner County against defendant Standard Oil Company were dismissed and a verdict of guilty rendered as against said Holt, and he was adjudged to pay a fine of \$100 and costs in each of said cases, and thereon defendant Standard Oil Company averred that the offense charged against it in the bill in this cause is a criminal charge, and that it cannot be put to answer or be proceeded against for such charge otherwise than by indictment or presentment, and a trial by a jury in a court of law, as in the case of other criminal charges, and

that no verdict or judgment of conviction had ever been rendered against it on account of the offense charged against it in the bill in this cause, and that therefore this court has no jurisdiction or authority to render against it a decree of ouster, as prayed in the original bill.

And in and by said answer the defendant oil company reiterated its denial that it had violated the laws of the State of Tennessee, or that the acts set forth in the original bill and charged against it were unlawful, and set up and averred that "the acts alleged and the acts really done by it * * * are transactions affecting and relating to interstate commerce exclusively, and wholly beyond the power or authority of the State of Tennessee to regulate or punish or control; and that said act, chapter 140 of the Acts of 1903, in so far as it assumes to do so, is void, for that it is in violation of the Constitution of the United States."

III.

That upon the issue thus made, proof has been taken by both complainant and defendant, and in the taking said proof certain matters were developed until then unknown to your complainant, and which will be hereinafter more fully shown to your Honor. For a full account of said bill, answer and other proceedings in the cause, reference is hereby made to the original record.

IV.

And now, by leave of your Honor, complainant brings this, her amended and supplemental bill, into your Honor's said court at Gallatin, and further shows unto your Honor:

(1) It is true that the defendant, Standard Oil Company, and C. E. Holt and O'Donnell Rutherford, were indicted by the grand jury of Sumner County at the May, 1904, term of the Circuit Court of said county, as set up in defendant's said answer hereinbefore referred to, and that said defendant, Standard Oil Company, and Holt and Rutherford, were duly tried at the September term, 32 1904, under the indictment charging a conspiracy with one S. W. Love, and that, by a verdict of a jury, the defendant, Standard Oil Company, and C. E. Holt, were found guilty and a fine of \$5,000 assessed against said Standard Oil Company, and a fine of \$3,000 assessed against said Holt, and judgment having been entered upon said verdict, an appeal therefrom was prayed by defendant oil company, and said Holt, to the Supreme Court of Tennessee, sitting at Nashville; and it is further true that said cause, having been heard by the Supreme Court of Tennessee, judgment of the Circuit Court of Sumner County was affirmed as to said Holt, but reversed as to defendant oil company, for the reason set up and insisted upon by defendant oil company, as a complete defense in its behalf to said indictment, that it being a corporation, could not be indicted, as it had been indicted, under the third section of chapter 140 of the Acts of 1903, and therefore the indictment was quashed as to said defendant Standard Oil Company and the case

dismissed as shown by the judgment of said Supreme Court, and as a part of said judgment "without prejudice to such other proceedings as may be instituted against said Standard Oil Company to enforce the provisions of chapter 140 of the Acts of 1903, and particularly the provisions of section 2 of said act."

Said cause was, in fact, decided by the Supreme Court of Tennessee on or about the 23d day of February, 1907, but the judgment therein was not actually entered until the 16th day of March, 1907, as shown by a copy thereof filed as Exhibit No. 1 to a certain stipulation and agreement which has been filed and made a part of the original record in this cause.

Complainant further shows that in said criminal proceeding, tried as hereinbefore referred to, defendant Standard Oil Company had insisted and in a proper manner set up as a defense to the indictment preferred against it, that said Act of 1903 does not authorize an indictment against a corporation or permit a fine to be imposed upon a corporation, but that the penalty provided by said Act of 1903 against a foreign corporation for offending against the provisions of section 1 of said act, was to be found in section 2 thereof, and to be enforced by a bill in equity in the nature of a *quo warranto* proceeding, to oust the foreign corporation from doing business in this State. This contention was sustained by the Supreme Court of Tennessee, and said cause having been decided, as hereinbefore shown, on or about February 23, 1907, and final judgment entered upon the minutes of the court on March 16, 1907, your complainant, immediately thereafter, filed her original bill in this court, as hereinbefore shown, for the purpose of ousting defendant Standard Oil Company from doing business within this State.

33 (2) Complainant further shows unto your Honor that some years prior to October 30, 1899, the defendant, Standard Oil Company, had established a branch of its oil business at Nashville, in Davidson County, Tennessee, for the purpose, among other things, of selling therefrom refined oil (commonly known in the trade as coal oil or illuminating oil) and gasoline, and had placed agents in charge of its said business in Nashville, where it had established depots and storage tanks for the purpose of storing oil which it sold in Nashville and the territory contiguous thereto and that several years prior to October 30, 1899, the Cassetty Oil Company, a corporation, chartered and organized under the laws of the State of Tennessee, with its principal office and place of business in Nashville, Tennessee, had also been engaged in selling, among other things, refined oil and gasoline in competition with the oil sold and delivered in Nashville by defendant Standard Oil Company, from its oil depots or storage tanks at that place.

The said Cassetty Oil Company was, prior to October, 1899, known as, and in fact was, an independent dealer, in that it procured its supplies of oil sold by it from sources independent of the Standard Oil Company, and sold the same in competition with the oil sold in Nashville by defendant oil company.

Complainant further shows that for some time prior to October 30, 1899, competition in the sale of refined oil between defendant Standard Oil Company and said Cassetty Oil Company had resulted in greatly reducing the price of refined oil to the consumer in Nashville, and the business of the Cassetty Oil Company—which had no refinery of its own—in the sale of refined oil and gasoline was crippled and reduced to a considerable extent. Whereupon, on or about the 30th day of October, 1899, the defendant, Standard Oil Company, and the Cassetty Oil Company entered into an agreement or contract in writing, as follows:

“Memorandum of agreement, entered into this the 30th day of October, A. D. 1899, by and between the Standard Oil Company of Kentucky, incorporated, party of the first part, and the Cassetty Oil Company, incorporated, party of the second part—the said Cassetty Oil Company being located at Nashville, Tennessee.

“Witnesseth: That the above parties hereby entered into the following agreement, this agreement to continue for a period of five (5) years from November 1, 1899, and to terminate October 31, 1904;

“For and in consideration of the conditions hereinafter named, the said party of the second part does hereby sell, convey and assign to the said party of the first part for the period covered by this agreement, all interest in the results or profits in the refined oil or gasoline business owned, controlled and operated by the said party of the second part;

34 “The party of the second part hereby agrees and binds itself to conduct the said refined oil and gasoline business in its own name as heretofore, giving the business such time and attention as required, utilizing all employees in the handling of the business as it has heretofore been handled, and in all particulars to give the business the same attention as if it were still being conducted in the interest of said second party; the party of the second part further agrees to be governed by and to follow in all particulars the direction of the party of the first part in the handling and marketing of said refined oil and gasoline during the existence of this contract;

“It is also agreed and understood that the party of the second part is to furnish the entire equipment requisite for handling the said refined oil and gasoline business, such as requisite storage tanks, warehouses and storage room, and all requisite facilities and appliances connected with the preparation and filling of barrels and other packages with said refined oil and gasoline; such storage tanks and warehouse buildings to be of good and sufficient character for the proper protection of the goods, wares and merchandise belonging to the party of the first part used in the handling of said refined oil and gasoline business; the party of the second part binds itself to in every way protect and care for the said stocks and merchandise, and to be accountable for same, excepting in case of loss by fire or

other causes or calamity against which reasonable precaution on their part could not have prevented.

"The party of the first part is to furnish the party of the second part all such stocks of refined oil and gasoline, empty barrels, glue, paint, bungs, etc., as may be required for the handling of said refined oil and gasoline business; all such oils are to be consigned to the party of the second part in tank cars, they to receive same and promptly unload all such tank cars on arrival. It is understood, however, a change in the method of supply of refined oils or gasoline may be made, by mutual agreement of the parties hereto, to meet any exigencies that may arise.

"The party of the second part agrees and binds itself to furnish all the requisite labor necessary in the handling of said refined oil and gasoline business, cooperage of barrels or packages, preparation and filling of same, draying and delivering, receiving and unloading, refined oils or gasoline, and to furnish all clerical help requisite for the keeping of accounts, necessary office room, account books, stationery, etc., used in the conduct of said refined oil and gasoline business; also to furnish the requisite salesmen for the selling and marketing of the said refined oils and gasoline, without expense or cost to the party of the first part, except as hereinafter named;

"The party of the second part further agrees and binds itself to furnish to the party of the first part monthly reports of sales of all refined oils and gasoline sold by said second party, and also
35 stocks on hand, and other reports deemed necessary to intelligently follow the business; and the said party of the second part binds itself to pay in cash by the end of each month for all sales made during the previous month, it being understood and agreed that the said party of the second part guarantees all sales made by it;

"The party of the second part further agrees and binds itself to aid and assist in every way possible the development of the refined oil and gasoline business, and to give its support and co-operation towards furthering the general interest of the party of the first part.

"In consideration of the foregoing, the said party of the first part agrees and binds itself, during the existence of this contract, to pay to the party of the second part the sum of Three Hundred and Thirty-three (\$333.33) Dollars and Thirty-three Cents per month, or at the rate of Four Thousand (\$4,000.00) Dollars per annum; and in further consideration of the labor and expense connected with the handling of said refined oil and gasoline business, the party of the first part agrees to pay to the party of the second part, as compensation for such labor and expense, the additional sum of One Hundred and Sixty-six (\$166.66) Dollars and Sixty-six Cents per month, or at the rate of Two Thousand (\$2,000.00) Dollars per annum. Should the total number of gallons of refined oil and gasoline handled by the party of the second part exceed during any one year two hundred thousand (200,000) gallons, the party of the first part agrees to pay to the party of the second part one (1) cent per gallon on such excess. The aforesaid payments to be made monthly, at the end of each month.

"Witness the signatures of the parties hereto this the 30th day of October, A. D. 1899.

"STANDARD OIL COMPANY (OF KENTUCKY),

"By ALEX. McDONALD, *P't.*

"Witness:

C. T. COLLINGS.

"CASSETTY OIL COMPANY,

"By JAMES R. McILWAINE, *V. P.*

"Witness:

VENABLE PITTS."

Said contract or agreement was executed upon the part of defendant Standard Oil Company by its then president, Alexander McDonald, and upon the part of the Cassetty Oil Company by its then vice-president, James R. McIlwaine.

Complainant further shows unto your Honor and charges that while said contract and agreement was, in form and upon its face, a sale and conveyance by said Cassetty Oil Company of all its interest in the results or profits of its refined oil or gasoline business for a period of five years from November 1, 1899, nevertheless, the real purpose and intention of the defendant, Standard Oil Company, and said Cassetty Oil Company, in entering into the said agreement, that said Cassetty Oil Company should cease competing with the defendant, Standard Oil Company, in the sale of refined oil and gasoline—that is, cease to be a competitor with the Standard Oil Company in its business of selling refined oil and gasoline in Nashville, Tennessee, thereby giving and yielding to said defendant company full control of the Nashville market in respect of the price of refined oil and gasoline to the consumer in that territory, and it was upon this consideration and for this purpose that the defendant, Standard Oil Company, agreed to pay, and did pay, to said Cassetty Oil Company the sum of \$500 per month from the first of November, 1899, to October 31, 1904.

Complainant further shows and charges that said agreement hereinbefore set out was entered into with a view to lessen, and that it did tend to lessen, full and free competition in the sale of defendant Standard Oil Company's oil at Nashville, and that it was designed to give to the defendant, Standard Oil Company, control, and that it did give to said defendant control, of the price or cost to the consumer of oil sold by it in the city of Nashville and the territory served therefrom; and after the execution of said contract defendant raised the price of oil several cents per gallon above the price to which it had been reduced by the competition aforesaid between it and the Cassetty Oil Company before said Contract was entered into, and said Standard Oil Company has been ever since in full control of the price or cost of oil to the consumer in Nashville and the territory served therefrom.

Complainant further shows and charges that prior to the execu-

tion of said contract the said Cassetty Oil Company held itself out, and was in fact an independent dealer in oil, and a part of said agreement was that it should continue to hold itself out as an independent dealer in refined oil and gasoline, and thereby deceive and mislead the public in regard to said agreement, so entered into for the purpose of eliminating and destroying competition between it and defendant company, and during the full period of five years from November 1, 1899, to October 31, 1904, the said Cassetty Oil Company, under the control and management of defendant Standard Oil Company, held itself out as an independent dealer in refined oil and gasoline, but pursuant to the purpose and intention of said agreement, did not enter into competition with defendant Standard Oil Company in the sale of refined oil and gasoline, thereby enabling defendant Standard Oil Company to fully control the price and cost of refined oil and gasoline to the consumer in the city of Nashville.

Complainant further shows and charges that during the full period of said contract—that is, up to and until October 31, 1904—the purpose and intention of the said parties to said contract was carried out and observed, and said Cassetty Oil Company did not compete with defendant Standard Oil Company in the sale of refined oil and gasoline, although, as provided in said contract, it held itself out to be an independent dealer in those products, and in consideration thereof continued to receive, down to October 31, 1904, the sum of \$500 per month from defendant Standard Oil Company; so that defendant Standard Oil Company, in the manner and by the means aforesaid, secured full control of the market and price of oil at Nashville, and having eliminated the Cassetty Oil Company as a competitor in the sale of refined oil and gasoline, the said defendant company, at the expiration of said contract, having no further use for the Cassetty Oil Company, declined to renew said contract, but has remained in practical control of the business of selling refined oil and gasoline in Nashville to this date.

Complainant further shows unto your Honor that, when she filed her original bill in this cause, she had no information in relation to the contract hereinbefore set out between defendant Standard Oil Company and the Cassetty Oil Company, and that her first information in regard thereto came to the Attorney-General during the taking of proof under the issues raised by the original bill and the answer thereto; and that the precise terms of said contract were not known to complainant or her Attorney-General until said contract or agreement was produced on November 2, 1907, by James R. McIlwaine, now the president, and William M. Cassetty, one of the directors of said Cassetty Oil Company, whose depositions were taken on behalf of complainant in this cause, and said agreement filed as Exhibit A to the deposition of said William M. Cassetty.

V.

To the end, therefore, that the defendant, Standard Oil Company, may show cause, if any it can, why complainant should not have the

relief prayed in her original bill, and in this amended and supplemental bill, complainant prays:

(1) That the defendant, Standard Oil Company, be duly served with a subpoena and a copy of this amended and supplemental bill, and that it be required to answer the allegations thereof fully and properly, but its answer under oath, or the equivalent of an oath, is hereby expressly waived;

(2) For a decree enforcing the provisions of chapter 140 of the Acts of the General Assembly of Tennessee for the year 1903, and particularly section 2 of said act, against defendant Standard Oil Company for and on account of its offenses against and violations of said act in said original and in this amended and supplemental bill

set out; and to that end that said Standard Oil Company be
38 denied the right to do, and be ousted from doing, business within this State; and in order that such decree may be made effectual, that the permission or license of the defendant, Standard Oil Company, to do business in this State be cancelled; that said defendant company, its officers, agents and employees, and all persons acting for it, may be perpetually enjoined from doing or carrying on its business in this State;

(3) For all such interlocutory orders and decrees as may from time to time become necessary in the progress of this cause, in order to attain the relief hereinbefore prayed, including, if it shall be necessary, an order restraining *pendente lite* the defendant company from carrying on and doing business within this State;

(4) And if in any way complainant is mistaken in her special prayers, she prays for all such other, further and general relief as in equity she may be entitled to, upon the facts hereinbefore stated;

(5) This is the first application for an injunction or extraordinary process in this cause, except as prayed in the original bill.

STATE OF TENNESSEE,

By CHARLES T. CATES, JR.,

Attorney-General of Tennessee.

W. A. GUILD,

R. L. PECK,

District Attorney-General for State.

CHARLES T. CATES, JR.,

Attorney-General of Tennessee.

STATE OF TENNESSEE, *County of Knox:*

Personally appeared before me, the undersigned authority, Charles T. Cates, Jr., Attorney-General of Tennessee, who, having been duly sworn, deposed and said that the statements made in the foregoing amended and supplemental bill are true and correct, to the best of his knowledge, information and belief; and particularly that the statements made in said amended and supplemental bill, in regard to the discovery of the existence of the contract between defendant Standard Oil Company and the Cassetty Oil Company, as therein set out, are true and correct.

CHARLES T. CATES, JR.,

Attorney-General of Tennessee.

Subscribed and sworn to before me on this the — day of November, 1907.

[SEAL.]

JOHN W. HENDERSON,
Notary Public.

39 *Demurrer and Answer to Amend- and Supplement- Bill.*
 Filed November 14, 1907.

Rule No. 237 in the Chancery Court of Sumner County, Tennessee.

STATE OF TENNESSEE *ex Rel.* ATTORNEY-GENERAL
versus

STANDARD OIL COMPANY OF KENTUCKY.

Answer of the Defendant to the Amended and Supplemental Bill
Filed on the 14th Day of November, 1907, Against it in This
Cause.

By leave of Court first had and obtained, this defendant, relying upon the grounds of demurrer herein stated, demurs to the said amended and supplemental bill for insufficiency in this, namely:

First. The matter complained of is not a thing to set up as ground for relief in a supplemental bill.

Second. The bill shows that the contract made with the Cassetty Oil Company was made and entered into on the 30th day of October, 1899, at which time there was no law in Tennessee which inflicted the punishment of expulsion upon foreign corporations for engaging in a conspiracy against trade, or for entering into such a contract as that mentioned in the supplemental bill, or which prohibited any foreign corporation which made any such contract from doing business in Tennessee.

Third. The bill shows that the contract with the Cassetty Oil Company terminated and expired on the 31st day of October, 1904, more than three years before said supplemental bill was filed, and that it is barred by the statute of limitations of Tennessee, particularly the statute of one year.

Fourth. The bill fails to aver and show that the defendant was put to answer the said charge of violating the laws of Tennessee in the making of said agreement by indictment, or presentment in some court of lawful jurisdiction of the State of Tennessee, and that after trial it was convicted therein by a verdict of a jury and the judgment of the Court.

Fifth. The contract set up in the supplemental bill is not illegal, but a valid, lawful contract.

Sixth. The bill shows that more than eight years elapsed since the said contract was made and the filing of the bill, and that this proceeding is barred by the statute of limitations, particularly the statute of one year, and the statute of five years.

Seventh. The contract, if a violation of law, is a violation of the laws of Congress regulating interstate commerce, and not a violation of the laws of Tennessee.

This respondent relies upon each and every of said grounds of demurrer.

Respondent now further answering, says that it is true that
40 on the 16th day of March, 1907, the complainant filed the original bill in this cause, and that on the 6th day of June, 1907, respondent filed its answer thereto, as stated in the supplemental bill.

Said pleadings speak for themselves.

It is also true that evidence has been taken by both parties upon the issues made by the pleadings in the case, and that the case has not yet been tried and determined.

It is also true that on the 30th day of October, 1899, this respondent and the Cassetty Oil Company, in the bill mentioned, made and entered into a written contract of the nature and tenor of that set forth in the supplemental bill. Respondent resumes that it is correctly copied in the bill, but does not mean to be precluded by this admission from showing any errors and mistakes in said copy if any shall appear upon an inspection of the original; and

It is true that this respondent in good faith complied with the obligations of said contract while, and so long as, it was in force.

Said contract was made and entered into at respondent's principal office in Cincinnati, in the State of Ohio, and the oil to be shipped to the Cassetty Oil Company thereunder was to be shipped, and it was shipped, from refineries and points outside of the State of Tennessee, and therefore, respondent, while denying that said contract is illegal, says that if it be mistaken, the offense is one against the laws of the United States, and not against the laws of the State of Tennessee, and that it cannot be proceeded against therefor, by the complainant in this Court, in the proceedings; and respondent pleads and relies upon the Federal question as a defense to the bill.

Respondent admits that there was competition at Nashville in the sale of refined oil between respondent and said Cassetty Oil Company to a limited and qualified extent. The latter company had no refinery, while respondent had refineries of its own, and the Cassetty Oil Company sold but little oil as compared with the quantity sold by respondent at Nashville, Tennessee.

Respondent believes it to be true that the Cassetty Oil Company, attempting to compete with respondent, with its limited outfit, no refineries, and limited capital, did cripple its business by making sales of oil at ruinously low prices; but respondent denies that after the execution of said contract the price of oils was advanced; and it denies that it has been in control of the price of oil at Nashville since that time. Upon the contrary, competitors having refineries of their own, and selling by the tank-wagon system (as your respondent does), have for years been dealing in and selling refined oils, or coal oils in competition at Nashville with your respondent.

Respondent says that it did not seek to make the said contract, but it was suggested and initiated by the Cassetty Oil Company.

Respondent denies that it was agreed that the relation established by this contract should be controlled by the Cassetty Oil
41 Company, and it says that the public was not deceived, but looked upon and regarded said Cassetty Oil Company as

having relations with, or as being controlled by, this respondent company.

Respondent denies that said contract was illegal. Respondent says that its purpose and effect was to make the Cassetty Oil Company an agency of this respondent, and that it was as lawful for it to make said Cassetty Oil Company its agent as it was, or would have been, to make a natural person agent.

Respondent says that all the oil contemplated by the said contract to be sold was the oil of respondent, and was to be the oil of respondent and was sold as the oil of respondent, as said contract shows, and that the contract was not illegal, and that even if the relations established by said contract was concealed from the public, that fact would not render the contract illegal.

Respondent says that when said contract expired October 31, 1904, said Cassetty Oil Company solicited respondent to renew it, but that it refused to do so, and did not renew it, or make any other in its place or stead.

Respondent further answering, says that there was no law in force in Tennessee when said contract was made, authorizing or permitting respondent to be denied the right to do business in Tennessee on account of the making of said contract, or authorizing the present proceedings against it on account of the making of said contract, upon the relation of the Attorney-General of Tennessee; and

Respondent says that the present proceedings cannot be maintained against it because respondent carried out said contract and because the same remained in force until October 31, 1904. They cannot be maintained because this respondent cannot be put to answer the charge made in the supplemental bill in equity, but only by presentment or indictment in some court of criminal jurisdiction.

Respondent says the present proceedings are barred by the statute of limitations, particularly the statute of one year, and the statute of three years, and the statute of five years; and it now and here expressly pleads, interposes, sets up, and relies upon the same, and every thereof, as a bar and as a defense to this action.

Respondent here refers to the 7th, 8th, 10th, 11th, 12th, and 16th; 19th and 20th paragraphs of its said answer, and makes them a part hereof as fully as if the defences and statements therein set out were repeated and restated herein; and now and here pleads and relies upon the same.

Respondent having fully answered, prays to be hence dismissed.

STANDARD OIL COMPANY,
By JOHN J. VERTREES,
JAMES W. BLACKMORE,
Counsel.

Upon the trial of this cause the State offered and relied upon the various stipulations as set out in the record, and upon the depositions

of S. W. Love, W. H. Lane, J. E. Cron, L. C. Hunter, Harris Brown, Claude Roseman, Thomas M. Honeywell, O. T. Reynolds, Wm. M. Cassetty and James R. McIlwaine, and the exhibits thereto attached.

The other evidence and exhibits were introduced and relied upon by defendant.

November 14, 1907.

J. D. G. MORTON, *C. and M.*

Filed June 18, 1907. J. G. D. Morton, C. & M.

In the Chancery Court of Sumner County, Tennessee.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY.

The depositions of L. C. Hunter, S. W. Love, W. H. Lane, J. E. Cron and Harris Brown, taken upon notice at the office of the Clerk and Master of the Chancery Court of Sumner County, Tennessee, at Gallatin, on Wednesday, June 12, 1907, to be read as evidence on behalf of defendant on the trial of the above entitled cause.

Present: Hon. C. T. Cates, Attorney-General, and William A. Guild, Esquire, Counsel for Complainant; James W. Blackmore, Esquire, and John J. Vertrees, Esquire, Counsel for defendant.

Caption, certificate and all formalities expressly waived.

Filed June 18, 1907. (Trans. Vol. 1, p. 125.)

S. W. LOVE, called on behalf of defendant, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for defendant:

Q. State your name, your age and your place of residence?

A. S. W. Love; I am sixty-one years old; residence, Gallatin, Tenn.

Q. How long have you lived in Gallatin?

A. I have been here thirty-odd years.

43 Q. 3. Were you ever engaged at Gallatin, Tenn., in the business of retail grocery merchant?

A. Yes, sir.

Q. 4. When?

A. From 1875 until last year, the last of last year.

Q. 5. 1906?

A. Yes, sir.

Q. 6. Are you acquainted with the business customs and usages at Gallatin, then, in that line of business?

A. Yes, sir.

Q. 7. Did you deal in coal oil, as a merchant?

A. Yes, sir.

Q. 8. I want to ask you specially about the transactions which occurred in 1903, out of which there grew certain indictments of the Standard Oil Company. Do you remember the circumstance, that there was such a thing?

A. Yes, sir. I don't remember the year and the day; I remember the circumstance, though.

Q. 9. At that time and previous thereto, whom had you been accustomed to purchase you- oil from, as a merchant?

A. The Standard Oil Company.

Q. 10. Subsequent to that time from whom did you purchase your oil; after that time, from whom did you purchase the oil?

A. I purchased it from them.

Q. 11. Mr. Love, how was the Standard Oil Company, and how has it been accustomed to deliver oil to its customers at Gallatin?

A. They have a wagon, and bring it right to the house.

Q. 12. Deliver it from tank wagons?

A. Yes, sir; put it right in your tank.

Q. 13. In point of convenience, how does that compare with the system of delivering it in barrels?

A. It is a heap nicer than delivering it in barrels. You don't touch it at all; you just see that they put in the number of gallons you want.

Q. 14. Is it measured right at the door?

A. Yes, sir.

Q. 15. Now, with reference to the usages and custom of the trade at Gallatin at the time of this transaction and previous thereto, I want to ask you whether or not there was any usage with reference to the countermanding of orders given by retail merchants to people from whom they purchase. What was the rule?

A. Why, we could do it if we wished to. We had that right, I suppose, to countermand any order that we wanted to.

Q. 16. Was that the custom to do that thing?

A. Yes, sir.

44 Q. 17. Was that an established custom here, and recognized by merchants?

A. Yes, sir.

Q. 18. Did you or not do that, countermand orders, from time to time?

A. Yes, sir.

Q. 19. And the custom and usage was that countermand of orders were recognized, if sent in before shipment?

A. Yes, sir.

Q. 20. And the orders considered cancelled?

A. Yes, sir.

Q. 21. Now, did you at any time—and if so, when—give an order to the Evansville Oil Company, for any oil; if so, when?

A. I don't remember the date, but I gave them an order for ten barrels; gave Roseman an order for ten barrels.

Q. 22. Where did you do that?

- A. At the store over here.
- Q. 23. At your store here in Gallatin, Tennessee?
- A. Yes, sir.
- Q. 24. Where was the oil to be shipped from?
- A. He didn't say; I suppose it was to come from Evansville.
- Q. 25. When it was shipped, it was to come from some point outside of Tennessee, was it?
- A. Yes, sir.
- Q. 26. When was it to be shipped?
- A. Why, I could not say.
- Q. 27. Was it to be delivered the next day, or some time later?
- A. Oh, no, as soon as they could deliver it, I suppose; I don't remember any certain time.
- Q. 28. He was a traveling salesman, was he?
- A. Yes, sir.
- Q. 29. Had he ever been here before to your knowledge?
- A. No, sir. He may have been; I don't remember whether he had or not.
- Q. 30. Did you ever countermand that order you gave Mr. Roseman?
- A. Yes, sir.
- Q. 31. Can you state when? Cannot you look at some of these telegrams and fix the date?
- A. No, sir; I don't remember what day it was now; I could not say, but it was probably a week after I gave the order before the Standard Oil man came around.
- Q. 32. Who was the Standard Oil man?
- A. Holt.
- Q. 33. C. E. Holt?
- A. Yes, sir; Holt and Rutherford came in the store.
- 45 Q. 34. What Rutherford?
- A. He was the agent here for the oil, delivered the oil.
- Q. 35. He was the local agent in charge?
- A. Yes, sir.
- Q. 36. Who delivered the oil?
- A. Yes, sir.
- Q. 37. Did they come to your place together?
- A. Yes, sir.
- Q. 38. What passed between you all?
- A. He came in and asked me, said "What will you take to countermand that order?" And I said, "What order?" And he said, "This ten-barrel order you bought from Roseman?" I said, "I don't know; what will you give me?" He said, "I will put you one hundred gallons of oil in the tank, if you will countermand it." I studied a while, and told him I would do it. You see, I got more out of the hundred gallons than out of the ten barrels, and no trouble, so I turned it down right straight.
- Q. 39. What did you do then?
- A. We went around to the telegraph office, and he wrote the despatch out, and I signed it, and he paid the charges.
- Q. 40. You went together to the telegraph company office?

A. Yes, sir.

Q. 41. And he wrote it out?

A. And I signed it, and he paid the charges.

Q. 42. Do you recognize that, or not, as a copy of the telegram?

A. That is about the substance of it.

Telegram shown to the witness reads as follows:

"Gallatin, Tenn., Oct. 12, 1903.—To Evansville Oil Company, Evansville, Ind.—Kindly countermand my order for ten barrels oil. S. W. LOVE."

Q. 43. Now, that being the 12th, when would you say it was you gave the order?

A. It was about a week before that.

Q. 44. That, then, would be about the 5th of October?

A. Somewhere along in there.

Q. 45. And Mr. Holt paid for it?

A. Yes, sir.

Q. 46. You didn't receive the oil from the Evansville Oil Company?

A. No, sir.

Q. 47. Did they ever tender it to you?

A. The car was shipped in here, but they never did ask me to take it.

46 Q. 48. Did they, or not, ever at any time ask you to take that ten barrels of oil?

A. No, sir.

Q. 49. Isn't it true that they shipped in a car load of oil?

A. It was shipped in, but they never came to me about it.

Q. 50. Did they say anything to you about it at all?

A. No, sir. They came here, I think, and made arrangements with Mr. Tom Ellis to dispose of it, and he moved it all down in his stable and disposed of it.

Q. 51. Now, did anything else pass between you and Mr. O'Donnell Rutherford and C. E. Holt, with reference to this matter?

A. No, sir.

Q. 52. You have stated all that happened?

A. Yes, sir.

Q. 53. Did anything in regard to it pass between you and Mr. Comer or any other representative or agent of the Standard Oil Company?

A. No, sir.

Q. 54. Any correspondence or communications of any kind?

A. Nothing at all.

Q. 55. Did you enter into any agreement or combination or conspiracy with either Mr. Holt or Mr. Rutherford or any other agent of the Standard Oil Company to increase the price of oil or reduce competition in oil in Gallatin?

A. No, sir.

Q. 56. Did you enter into any such agreement or arrangement or understanding with either Mr. Cron, a merchant of this place?

A. No, sir.

Q. 56. Or Mr. Hunter, a merchant of Bethpage; or Lane, of this place; or anybody else?

A. No, sir; nobody at all.

Q. 58. Do you know the fact that orders given to the Evansville Oil Company, about the time yours was, by other merchants, were countermanded?

A. No, sir; I didn't know anything until it was all over with.

Q. 59. Did you have any knowledge of it or connection with it?

A. No, sir; not a bit.

Q. 60. Did you agree with anybody else such a thing should be done?

A. No, sir.

Q. 61. With Mr. Cron that he should be induced to countermand his order?

A. No, sir.

Q. 62. Or Lane, his order?

A. No, sir.

47 Q. 63. Or Mr. Hunter, his order?

A. No, sir.

Q. 64. Or did you agree with anybody that you should be induced to countermand your order?

A. No, sir; nobody but Holt; I agreed with him.

Q. 65. You agreed with Holt you would do it, if he gave you that oil?

A. Yes, sir.

Q. 66. And you did do it?

A. Yes, sir.

Q. 67. And he delivered the oil?

A. Yes, sir.

Q. 68. Who delivered the oil?

A. Mr. Rutherford.

Q. 69. Do you recollect when it was delivered?

A. It was a day or so afterwards, might have been the next day; I don't remember now.

Q. 70. A short time?

A. Well, it was a day or so afterwards.

Q. 71. Did you make any agreement or contract in any wise or in any way relating to the oil that the Standard Oil Company had stored here, whether they had much or little; did you know anything about that?

A. No, sir.

Q. 72. Did you have anything to do with it?

A. No, sir.

Q. 73. Did you know whether they had much or little or any oil actually here in stock at that time?

A. No, sir; I didn't know anything about it; but their capacity here is enough to keep two or three cars; but I don't know whether they had any or not.

Q. 74. Did your agreement in any way relate to oil that they may have had on hand?

A. No, sir.

Q. 75. Was there or not a definite time in which this oil was to be delivered to you, this hundred gallons?

A. I think it was done the next day.

Q. 76. You say it was done shortly afterwards; but did the agreement call for it to be delivered at any special time?

A. Oh, no, sir.

Q. 77. It just didn't say when it was to be done?

A. No, sir.

Q. 78. They just said they would give you the oil?

A. Yes, sir.

Q. 79. And that was all of it?

A. Yes, sir.

48 Q. 80. Of course, you expected it to be done shortly?

A. Yes, sir.

Q. 81. Was Holt or Rutherford there when it was delivered?

A. I don't think he was; no, it was Rutherford.

Q. 82. Was it Rutherford or the negro driver?

A. It was Rutherford.

Cross-examination.

By Mr. CATES, Attorney-General:

Q. 83. You were a merchant here in Gallatin in October, 1903?

A. Yes, sir.

Q. 84. And had been, up to that time, buying your supplies of oil from the Standard Oil Company, from its oil stored in a tank here at Gallatin?

A. Yes, sir.

Q. 85. The Standard Oil Company was in business as an oil dealer here in Gallatin at that time?

A. Yes, sir.

Q. 86. Both retailing and wholesaling oil?

A. Yes, sir.

Q. 87. The warehouse and the depot of the Standard Oil Company was very close to your place of business, was it not?

A. Yes, sir.

Q. 88. And up to the time that Mr. Roseman came here and offered to sell you oil from the Evansville Oil Company, you were buying the Standard Oil Company oil for thirteen and a half cents per gallon, weren't you?

A. Yes, sir.

Q. 89. Now, there was considerable complaint about the oil of the Standard Oil Company at that time?

A. Yes, sir.

Q. 90. And previous to that?

A. Yes, sir.

Q. 91. That the oil which they were furnishing to you and their customers here was of an inferior grade of oil?

A. Yes, sir.

Q. 92. So, when Roseman came around, you gave him an order for ten barrels of oil from the Evansville Oil Company at fourteen and a half cents per gallon?

A. Yes, sir.

Q. 93. In order that you might obtain for your customers a better grade of oil than the Standard Oil Company could furnish you?

A. Yes, sir.

49 Q. 94. Now, I hand you this paper, and ask you to examine it and state if it is not the order, or the duplicate of the order which you gave Roseman for the ten barrels of oil?

A. Well, I could not tell you anything about that, for I didn't see the order after he took it.

Q. 95. Isn't that your signature at the bottom of it?

A. Yes, sir.

Q. 96. Now, it is dated October 5, 1903, isn't it?

A. Yes, sir.

Q. 97. The Evansville Oil Company and then order, ship to S. W. Love at Gallatin, Tenn., about November 1, 1903, ten barrels of oil at fourteen and one-half cents per gallon, ten empty barrels, ten dollars?

A. Yes, sir; ten empty barrels, ten dollars, that comes off.

Q. 98. Ten empty barrels?

A. Yes, sir; one dollar per barrel.

Q. 99. And you were to receive credit for that when you returned them?

A. Yes, sir.

Q. 100. Isn't this on the order: Guaranteed against leakage and to be paid for as used, and we pay inspection. Signed, S. W. Love, C. Roseman?

A. That is my signature.

Q. 101. Now, that was on October 5th, as stated on that order?

A. Yes, sir.

Q. 102. And on October 12th, as shown by this telegram, Mr. Holt came to your place of business?

A. Yes, sir.

Q. 103. Do you know how he had become informed or how the Standard Oil Company had become informed that you had given this order to Roseman?

A. No, sir; I do not.

Q. 104. Holt came in and asked if you had not ordered some oil of the Evansville Oil Company, and you told him you had?

A. Yes, sir.

Q. 105. And then he proceeded at once to offer you a hundred gallons of oil to countermand that order?

A. Yes, sir.

Q. 106. And after some little consideration, you thought it was to your advantage to do so?

A. Yes, sir.

Q. 107. And on account of that inducement you did countermand the order?

A. Yes, sir.

50 Q. 108. They didn't say a word to you about selling you any oil that day?

A. No, sir.

Q. 109. They came to get you to countermand that order?

A. Yes, sir.

Q. 110. Now, you were asked, Mr. Love, about custom and usage, in respect to countermanding orders for goods purchases, that were not delivered immediately. It was no part of that custom, was it, for some one else to come along and give a bonus to induce the merchant to countermand the order?

A. No, sir.

Q. 111. Why did they tell you they wanted to countermand that order?

A. I don't know, sir, unless it was to stop the oil from coming in here.

Q. 112. Wasn't it to prevent that oil coming here in competition with their own oil which was then being sold here in Gallatin?

A. It looks to me that is was.

Objected to by defendant.

Objection overruled. Appeal taken.

Q. 114. And that was your understanding at the time, wasn't it?

A. Yes, sir; I think it was.

Q. 115. Now, isn't it a fact, Mr. Love, that some time after you had given the countermand, the oil was actually shipped here and reached the depot at Gallatin from the Evansville Oil Company?

A. Yes, sir.

Q. 116. You don't remember, however, whether Mr. Hunnywell came to see you about taking the oil?

A. No, sir; I don't remember; but I don't think he did, though.

Q. 117. At any rate, you didn't take it?

A. No, sir.

Q. 118. You had been paid not to take it, and didn't take it?

A. I didn't take it.

Q. 119. And you would not have taken it if he had come to see you?

A. No, sir.

Q. 120. Because of the consideration you had received from the Standard Oil Company to countermand that order?

A. No, sir.

Q. 121. Has the Standard Oil Company ever collected or sought to collect off of you the price of that hundred gallons of oil which was given to you to countermand that order?

A. No, sir.

Q. 122. And has either Holt or Rutherford collected for it?

A. No, sir.

51 Q. 123. The price of that oil off of you?

A. No, sir.

Q. 124. Have they ever sought to collect it off you?

A. No, sir.

Q. 125. And you disposed of it and made more profit off of it than you could off of the ten barrels of oil?

A. Yes, sir, and less trouble.

Q. 126. Now, Mr. Love, later, perhaps about the first of November or some time in November, the Standard Oil Company increased the price of oil from thirteen and a half cents per gallon to fourteen and a half cents a gallon, did it not?

A. I believe it did.

Q. 127. That was its tank oil?

A. Yes, sir.

Q. 128. That it increased the price of?

A. Yes, sir.

Q. 129. Increased the price of its tank oil up to the same price that you had bought oil from Roseman for?

A. Yes, sir.

Q. 130. Do you remember what they were selling oil for in barrels here at that time?

A. No, sir; I do not; I never bought any oil in barrels; always had the wagon to bring it to the store.

Q. 131. The fact is, up to that time the Standard Oil Company controlled the oil business here in this market, didn't it?

A. Yes, sir.

Q. 132. It had no competitors?

A. None at all.

Q. 133. And Roseman was the first man who came in here and sought to compete with that oil stored here, and sold by the Standard Oil Company in Gallatin?

A. The first one I knew anything of.

Q. 134. And you had been in business here thirty years?

A. Yes, sir, thirty years—twenty-nine years.

Q. 135. Nobody else has been competing with them since then, has there?

A. No, sir.

Q. 136. The fact is, as a matter of business, you cannot compete with oil under those conditions, where customers are given a bonus to countermand their orders, can you, Mr. Love?

A. No, sir.

Q. 137. Do you know where O'Donnell Rutherford is now?

A. No, sir; I do not; he went to Michigan, I think, from here.

Q. 138. Who is the agent of the Standard Oil Company here now?

52 A. William Baber; he delivered the oil here in the tanks or wagon.

Q. 139. Who is the agent here at this place?

A. Yes, sir; he is.

Q. 140. This hundred gallons of oil that Mr. Holt gave you to induce you to countermand that order of the Evansville Oil Company to be delivered to you right away, out of the tanks here?

A. I think I got it the next day.

Q. 141. And you understood it was to come right out of the tanks here?

A. Yes, sir.

Q. 142. Or you could get it out of the wagon passing your store?

A. That is what I mean; we call that the tank, the tank wagon.

Q. 143. And that is the way you did get it?

A. Yes, sir.

Q. 144. Who suggested the telegram?

A. He wrote it himself.

Q. 145. Mr. Holt suggested the telegram?

A. Yes, sir, and wrote it; I signed it, and went around to the express office on the far side of the depot.

Q. 146. Was that the telegraph office also?

A. Yes, sir; and he called for a blank and filled it out, and I signed it, and he paid the charges.

Q. 147. He wanted to get the countermand order in quick, did he?

A. Yes, sir; it seems so.

Redirect examination.

By Mr. VERTREES, for Defendant:

Q. 148. You said that your understanding was that that order was countermanded to stop competition. Did you mean by that, you had an understanding with Holt or Rutherford to that effect, or that is your interpretation of what was done?

A. That is my interpretation of what was done.

Q. 149. Did you have any understanding with them about it?

A. No, sir.

Q. 150. No discussion of that point in any manner, shape or fashion?

A. No, sir; I just supposed that was what it was done for.

Q. 151. It is just a supposition of yours?

A. Yes, sir.

Q. 152. Now, you say the Standard Oil Company increased the price of oil in November?

A. I think it went up to fourteen and a half cents.

53 Q. 153. Now, isn't this true, Mr. Love, during the many years you did business here at Gallatin, that the price fluctuated a little, half a cent or a cent at a time, sometimes would go up and sometimes go down?

A. That is the way it went.

Q. 154. Changed as much as two or three times a year throughout the whole period that you were in business here?

A. Yes, sir.

Q. 155. Isn't that true?

A. Yes, sir; that is the way it went.

Q. 156. Do you recollect how, as a rule, the advances were made, whether it was advanced in the winter season or decreased?

A. It generally went up in the winter season; when fall set in, oil would advance.

Q. 157. Then this advance you speak of, isn't it true that is not more than the usual and customary advance made every winter?

A. I don't think it was; it might have been a higher price at that time than it had been before, but they generally advanced the oil a little in the fall.

Q. 158. Do you recollect how much they advanced it at this time?

A. It was about a cent, I suppose.

Q. 159. You don't remember, though, what it was?

A. I don't remember exactly, but it was some advance.

Q. 160. Now, you have said there was complaint at that time about the oil. I will ask you if that complaint didn't come from people who had been accustomed, for years, to use the Standard Oil Company oil without complaint?

A. I reckon it did, for there was no other oil in here to be used.

Q. 161. And was there any other oil to be used?

A. No, sir.

Q. 162. And were not these complaints at that time against oil then on hand, or on hand just before that?

A. Yes, sir; just about that time.

Q. 163. Previous to that there had not been complaints?

A. No, sir.

Q. 164. How long had those complaints been?

A. I think they got hold of a bad car about a month or so before this thing happened, and put it in the tank there, and drawing it out there, it took some time to use it, and most everybody got a dose of it.

Q. 165. And that is the way it happened?

A. We all got some of it; it was all over town; every merchant in town had a lot of that bad oil.

54 Q. 166. And that was used up, and what about the oil that came afterwards?

A. Well, it got better afterwards, after we got rid of the bad tank.

Q. 167. Now, you said a while ago you understood the oil was to be delivered out of the tanks here?

A. I mean the wagon; we call that the tank, the tank wagon.

Q. 168. What you mean is, you understood that they were to deliver you a hundred gallons of oil from the tank wagon like they always delivered the oil?

A. Yes, sir.

Q. 169. But where it was or where it was to come from, you had no agreement?

A. No, sir.

Q. 170. Whether it was here then or to come in, you didn't know?

A. No, sir.

Q. 171. But you expected that hundred gallons to be delivered to you?

A. Yes, sir.

Q. 172. And their mode of delivery was by tank wagon?

A. Yes, sir.

Q. 173. And that is what you mean?

A. We call it a tank or tank wagon, runs all over town; it is a tank on a wagon.

Q. 174. How much do these tanks hold?

A. I suppose about five or six barrels.

Q. 175. You said a while ago that they didn't offer (Holt and Rutherford didn't offer) to sell you any oil that day?

A. No, sir; they were on a trade; they didn't want to sell any oil that day.

Q. 176. Now, isn't this true, that the usual way you bought oil was to telephone them to send you any quantity you desired?

A. I usually did that or caught the wagon going by and stopped it.

Q. 177. They didn't, as a rule, solicit your trade, because they expected you would order it if you wanted it?

A. Yes, sir.

Q. 178. The wagon would pass, and you would tell them to give you some?

A. Yes, sir.

Q. 179. And sometimes you would telephone them?

A. Yes, sir.

Q. 180. That was the course of business?

A. Yes, sir.

55 Q. 181. I will ask you with reference to this ticket of purchase, as I understand you to say, that is your signature to it?

A. Yes, sir.

Q. 182. It reads as follows: "Order No. —, Oct. 5, 1903, Evansville Oil Company, 10-14, countermanded. Ship S. W. Love, Gallatin, Tenn., via car, about November 1, 1903, G.-3. Business, deliver 10 barrels, Oliene, 14½; 10 empty barrels, \$10.00; \$1.00 for barrels f. o. b. Gallatin. Guaranteed against leakage and to be paid for as used; we pay inspection. Purchaser, S. W. Love. Salesman, C. P. Roseman." I will ask you to examine this original ticket carefully, which you say bears your signature, and see if it does not appear that the words and figures 10-14, countermanded, appear to be written at a different time and with a different pencil from what the other was written in?

A. No, sir; this was all written at one time.

It is agreed that the "10-14, countermanded," were put on the order by the Evansville Oil Company.

By Mr. CATES, Attorney-General:

Q. 183. Mr. Love, you were asked about whether or not the advance of one cent immediately following this countermanding of the order, or shortly afterwards, the price of tank oil, was not a usual advance. You do not recollect whether that was the usual advance for that season of the year, do you?

A. No, sir; I do not.

Q. 184. The fact about the business is, the Standard Oil Company fixes the price of oil it sold here whenever it wanted to, didn't it?

A. Yes, sir.

Q. 185. And all you merchants paid that price which they fixed?

A. Yes, sir.

Q. 186. Now, do you remember what the price of oil was in October, 1902, the year before this?

A. No, sir.

Q. 187. Or October, 1904, the year after this?

A. No, sir.

Q. 188. You could not get oil from anybody else here but the Standard Oil Company until Roseman came here, could you?

A. No, sir.

Q. 189. Now, you have told counsel for the defendant in regard to that bad oil, which the customers were complaining of here, and which the people around in this country generally were complaining of, came from a bad car load. Now, that is what they told you about it, isn't it, the Standard Oil people; that is the excuse they gave?

A. That is all they could do; that is all the excuse they had; it was a bad car.

56 Q. 190. You don't know of your own knowledge an inadvertent bad car?

A. No, sir, I do not.

Q. 191. But it was oil they had shipped and sold to you?

A. Yes, sir.

Q. 192. You say the oil got better after that car was gone?

A. After that car was gone, yes, sir.

Q. 193. Got better after Roseman was here?

A. Yes, sir, after they used the bad car up; then the oil was better.

Q. 194. When was that?

A. Well, it was probably a month after Mr. Roseman was in here.

Q. 195. About that time?

A. Yes, sir.

Further this deponent saith not.

S. W. LOVE.

Sworn to when given, and subscribed before me on this the 24th day of June, 1907.

J. D. G. MORTON,
Clerk and Master.

Witness claims attendance one day.

Filed June 18, 1907. (Trans., Vol. I, p. 159.)

W. H. LANE, called on behalf of defendant, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. 1. This is Mr. W. H. Lane, I believe?

A. Yes, sir.

Q. 2. Where do you live?

A. Out on the Red River Turnpike, just out at the edge of the corporation.

Q. 3. At Gallatin, Tenn.?

A. Yes, sir.

Q. 4. What is your age?

A. I am thirty.

Q. 5. How long have you lived in Gallatin?

A. I was raised right here.

57 Q. 6. What is your business?

A. Well, up to the first of this month I was in the retail grocery business.

Q. 7. From what time until this month were you in the grocery business?

A. I was in business over there five years.

Q. 8. Then, in the year 1903, you were a retail merchant at Gallatin, Tenn.?

A. Yes, sir.

Q. 9. Did you deal in coal oil, as a merchant?

A. Yes, sir.

Q. 10. From whom were you accustomed to buy?

A. The Standard Oil Company.

Q. 11. How was it delivered to you?

A. In a wagon.

Q. 12. Tank wagon?

A. Yes, sir.

Q. 13. At your place of business?

A. Yes, sir.

Q. 14. What is the comparative merit of the two systems of delivery, by tank-wagon or barrels at the depot?

A. The tank wagon is far superior, much more convenient for the merchant.

Q. 15. And satisfactory?

A. Yes, sir.

Q. 16. Has any other dealer than the Standard Oil Company, to your knowledge, ever attempted to deliver oil at Gallatin by the tank-wagon system?

A. No, sir; not that I know of.

Q. 17. Any other way, has anybody else come into the market to deliver by barrels or otherwise?

A. Yes, sir.

Q. 18. Do you recollect some transactions some years ago in which agents for the Standard Oil Company secured countermands of some orders given by merchants here to the Evansville Oil Company? Do you remember there was something of that kind?

A. Yes, sir.

Q. 19. When was that?

A. That was in 1903, some time in October.

Q. 20. And you were in business then?

A. Yes, sir.

Q. 21. Had you given an order to the Evansville Oil Company for oil?

A. Yes, sir.

58 Q. 22. What agent representing that company obtained the order?

A. I think his name was Roseman, something like that.

Q. 23. Where did his company do business?

A. Evansville.

Q. 24. Evansville, Ind.?

A. It was called the Evansville Oil Company; I suppose it did.

Q. 25. Where was the oil to be shipped from?

A. Why, I don't know; I didn't know where it was coming from.

Q. 26. Was it to come from some point out of the State of Tennessee?

A. I suppose so; yes, sir.

Q. 27. To refresh your recollection, wasn't it to come from Oil City, Pennsylvania?

A. I believe it was; I believe they had a refinery or something at Oil City.

Q. 28. Wasn't it to be shipped by the way of Cairo?

A. I could not say; I don't remember.

Q. 29. When was it to be delivered?

A. Just gave the order; no stipulated time in the order, I don't believe.

Q. 30. What price were you to pay for that oil?

A. Fourteen and a half cents, I think.

Q. 31. Per gallon?

A. Yes, sir.

Q. 32. What about the barrels?

A. We were to be charged with the barrels, and when we returned the barrels, were to receive credit of a dollar.

Q. 33. At what price?

A. Same price we were charged.

Q. 34. As I understand, you were to pay fourteen and a half cents a gallon for the oil and a dollar per barrel for the barrels containing it, and to be given credit for each barrel returned, at one dollar each?

A. Yes, sir.

Q. 35. Where was the oil to be delivered to you?

A. At the depot at Gallatin.

Q. 36. How much did you order?

A. I ordered five barrels.

Q. 37. Did you countermand that order?

A. Well, in a certain way I did; I countermanded it through the Standard Oil Company's agent.

Q. 38. It was countermanded?

A. Yes, sir.

59 Q. 39. Do you remember how long afterwards it was?

A. It was several days after that, I don't remember the dates; if I had the telegram which would show for itself, I could tell.

Q. 40. Assuming you ordered it about the 5th of October, how long afterwards before you sent the telegram?

A. Why, I suppose it was about six or seven days.

Q. 41. Was it the day Mr. S. W. Love countermanded his order?

A. Yes, sir; the same day.

Q. 42. We have agreed that was the 12th of October?

A. That is possibly the date.

Q. 43. Yes, that was the day?

A. I countermanded the same day he did.

Q. 44. I want to ask you about a usage or custom at Gallatin, whether there was any usage or custom, established usage and custom in Gallatin of merchants to countermand or their right to do so?

A. I suppose you can countermand the order if you want to, unless the face of the order stipulated it is not to be countermanded. Some orders have it written on the back not subject to countermand. Of course an order like that a merchant would know he could not countermand, but, ordinarily, I suppose if you find out you don't want it, you could countermand it, so you do it before it is started to be shipped on the road.

Q. 45. Was that the custom and usage and understanding of merchants that such was the right of merchants?

A. I suppose so; I have never heard it disputed.

Q. 46. Did you understand it that way?

A. Yes, sir.

Q. 47. And never heard it disputed?

A. No, sir.

Q. 48. State what happened with reference to countermanding this order of yours?

A. Well, some time late in the evening; I suppose it was October 12, you say that is the date.

Q. 49. That is the date of the Love transaction?

A. Well, Mr. Rutherford and Mr. Holt, the Standard Oil representatives, came over to our place of business and asked me if I didn't want to countermand the order for that oil, and I said, what oil? and he said, the oil you bought from the Evansville Oil Company; and I said, no, I guess not; and he says, why, what is the matter? and he went on to say he had secured the countermand of all the other merchants that had bought oil from him here, and I had just as well countermand my order, for I would not get the oil; they would not ship five barrels of oil here; and I says, well, there is no use of countermanding if they will not ship it, I will

60 just let it go, and Holt and Rutherford, one, or possibly both of them, spoke up and said, if you will countermand the order we will give you fifty gallons of oil, and I says, all right, let her rip; so they got out a telegram and wrote out a countermand and asked me to sign it, and said they would send it, and that was the last I heard of it. I asked Mr. Rutherford if he would see that I got the oil, and he said he would.

Q. 50. What was Mr. Rutherford's position?

A. He was the local agent.

Q. 51. Was he the man accustomed to deliver it in the tank wagon?

A. Yes, sir.

Q. 52. From whom you had previously received it?

A. Yes, sir; I had been buying from him before.

Q. 53. Was there anything said about the stipulated time?

A. I told him I would take it as I needed it.

Q. 54. There was no date fixed when you were to get it, but you were to take it as you needed it?

A. Yes, sir; any time I wanted it.

Q. 55. And you were to let him know when you wanted it?

A. Yes, sir.

Q. 56. And that was the agreement as to dates?

A. Yes, sir.

Q. 57. Who was Mr. Holt; do you know what his position was?

A. He works for the Standard Oil Company; I suppose he is district agent, or something.

Q. 58. You didn't know?

A. I didn't know what official position he held.

Q. 59. But he represented it?

A. He represented the Standard Oil Company.

Q. 60. How were you accustomed to get your oil; would they come around and solicit you or would you order it whenever you wanted it?

A. They would come around; they have certain days to deliver oil.

Q. 61. The tank wagon would come around, you mean?

A. Yes, sir.

Q. 62. And you would tell them what you wanted?

A. Yes, sir; and I would tell them what I wanted and they put it in the store.

Q. 63. Had there been any complaint about that time about the oil of the Standard Oil Company?

A. There was some complaint; yes, sir.

Q. 64. How long standing had it been?

A. I think just about that time?

Q. 65. It was recent, was it?

61 A. Yes, sir; it hadn't been a universal kick, they had not been kicking all the time; a short time before that they commenced to kick.

Q. 66. What was the complaint?

A. Said it didn't burn good, would flicker, and claimed it was watered, and everything else.

Q. 67. Were you burning some of the same oil?

A. We were using the oil out at my house; I used electricity at the store.

Q. 68. I mean at your house?

A. Yes, sir.

Q. 69. How was it?

A. I never heard my wife say anything about it, but I never paid any attention.

Q. 70. Can you relate any experience you had with your customers?

A. Some of them were kicking.

Q. 71. Is there any particular one you can relate about?

A. An uncle of mine, Mr. Davis, in the country, kicked and brought a stand back, five-gallon stand I sold him; said he could not use it, and I asked him what was the matter with it; and he said

it would not burn, and I says, I don't know what I am going to do about it, there is no other oil here but Standard Oil, what are you going to do about it? and he says, get some oil from somebody else, and I said, I will send for Alex. Schell, he was the inspector.

Q. 72. Was he the Coal Oil Inspector?

A. Yes, sir; and he came around and tested a sample of the oil, and said it was all right, and he says, Bill, it is not the oil, it is your tank; your tank is foul; and I says, why, I don't suppose it is, I clean my tank every six months, and it is one of these Bowser tanks, and cannot any dust get into it very easy, so I went right next door to Mr. Burks' and got Mr. Davis oil there.

Q. 73. He was another merchant?

A. Yes, sir; right next to me.

Q. 74. And had him fill the can?

A. Yes, sir; and carried it out, and it was all right, and I never heard any more kick, and he came back the next time and said, you get the oil where you did before, but I got it out of my stand, and I never heard any more about it.

By Mr. CATES, Attorney-General:

Q. 75. How was that?

A. I went and got it out of my own stand, like I had before, and I never heard anything more from it, but it was probably a month or six weeks before he came back that time.

62 By Mr. VERTREES, for Defendant:

Q. 76. What was the cause of this oil trouble and complaints?

A. No, sir; I don't know.

Q. 77. It passed away shortly?

A. They claimed it was bad oil, but I don't know anything about it.

Q. 78. Now, did you enter into any combination or agreement or conspiracy or contract?

A. That is all the agreement I had with anybody.

Q. 79. To lessen the competition in oil at Gallatin or increase the price or enhance the price of anything of that kind?

A. Not that I knew anything about; all I did was to give an order for oil and countermand it, under the circumstances I stated. Nothing was said about any conspiracy or agreement.

Q. 80. Did you agree with reference to that matter with the other merchants, Mr. Cron and Mr. Hunter and Mr. Love?

A. I didn't see the other merchants at all; the only men I saw was Holt and Rutherford.

Q. 81. Did you send any word to them, or they send any word to you?

A. No, sir; nothing said at all.

Q. 82. Did you know they had or had not, when you did?

A. Only by what Holt said.

Q. 83. He said he had seen them?

A. Yes, sir.

Q. 84. That they had countermanded theirs and yours would not come?

A. Yes, sir; that the oil would not come; that they had to get a car load to get it at fourteen cents.

Q. 85. Did they demand of you to take that oil?

A. Who, Roseman?

Q. 86. Yes?

A. No, sir; I never heard anything about it.

Q. 87. Did you ever hear anything more about it?

A. No, sir.

Q. 88. After your countermand order went in, that was the last you heard?

A. The oil came here and I never heard any more.

Q. 89. Did they come and ask you to receive any of it?

A. No, sir.

Q. 90. Any representative of the Evansville Oil Company?

A. No, sir.

Q. 91. You had nothing more to do with it.

A. Nothing further.

63 Q. 92. Did you have any agreement of any kind relating to any oil they had here stored at that time in stock at Gallatin?

A. That was all I had to do with it; after I countermanded it, I never heard any more.

Q. 93. Did your agreement with Holt and Rutherford relate to any particular quantity of oil anywhere?

A. You mean Holt and Rutherford?

Q. — Yes.

A. No, sir; nothing further than fifty gallons.

Q. — And to deliver that quantity to you?

A. That was all I had anything to do with.

Q. 96. Whenever you wanted it?

A. Any time I wanted it or called for it.

Q. 97. Do you remember when you did call for it?

A. I think I got possibly twenty gallons the next week, and thirty gallons the next week; didn't take it all at once.

Q. 98. You didn't take it all at once?

A. No, sir.

Q. 99. But took it at different times?

A. Yes, sir.

Q. 100. Do you know where Mr. Rutherford is now?

A. No, sir; he is not at Gallatin; he is sick somewhere.

Q. 101. Is his health bad?

A. Yes, sir; in bad health.

Q. 102. In very bad health?

A. Yes, sir.

Q. 103. Did he leave Gallatin on account of his health?

A. Yes, sir.

Q. 104. Who is the local agent of the Standard Oil Company here?

A. Mr. Baber; Mr. W. H. Baber, I believe it is.

Q. 105. Do you know how far distant from Gallatin the Standard Oil Company was accustomed to deliver oil in their tank wagons?

A. Well, they delivered it at Dickson Springs.

Q. 106. How far is that?

A. About twenty-six or seven miles, I guess, and deliver it up here at Fulton.

Q. 107. How far distant is that?

A. That is about twelve or fourteen miles.

Q. 108. Are those deliveries made by tank-wagons routed from Gallatin?

A. Yes, sir.

Q. 109. Has any other dealer or company, to your knowledge, ever offered to do business here on the tank-wagon system?

A. No, sir; not that I know of.

64 Q. 110. And you have been living here how long?

A. I have been here ever since I came into the world.

Cross-examination.

By Mr. CATES, Attorney-General:

Q. 111. How far is it from here to Nashville?

A. Twenty-six miles.

Q. 112. Now, you have told Mr. Vertrees about your uncle complaining about the oil which you were selling in October, 1903. Isn't it a fact that numbers of your customers besides your uncle complained?

A. His was more specially brought to me on account of the examination of the oil.

Q. 113. Don't you know, as a matter of fact, that there was a general complaint here to dealers in oil?

A. I believe there was.

Q. 114. In regard to the quality of oil?

A. I believe there was, about that time.

Q. 115. Not only from the tank in your store, but from the tanks of other merchants in their stores?

A. Yes, sir; there was some kick.

Q. 116. And you were paying the Standard Oil Company 13½ cents per gallon?

A. Yes, sir; one cent less than the other.

Q. 117. And when Roseman came, you agreed to pay 14½ cents?

A. Yes, sir.

Q. 118. And for a better grade of oil, too; wasn't it?

A. Supposed to be.

Q. 119. Do you know how Holt and Rutherford knew you had given an order to the Evansville Oil Company?

A. No, sir.

Q. 120. You didn't hunt them up, but they came to your store and hunted you up?

A. Yes, sir; came to me.

Q. 121. How did they claim to know that; they had received

information that you had purchased five barrels of oil from the Evansville Oil Company?

A. They didn't say; they just came in and talked like they knew all about it; I don't know how.

Q. 122. Then they talked like they knew all about it?

A. Yes, sir; they came in and asked if I wanted to countermand.

65 Q. 123. They first wanted to make you dissatisfied by saying that the Evansville Oil Company would not ship your order any way?

A. They told me—I was kind of obstinate in buying the oil, because I could get it delivered from the tank wagon; I told him I would not buy from him, but if he sold the other merchants I would be forced to buy, and after he said he had sold all enough to make a carload except mine; I told him all right, I would take it.

Q. 124. So they told you if you would countermand your order they would give you fifty gallons of oil?

A. Yes, sir.

Q. 125. Who were they representing, the Standard Oil Company?

A. Both of them were working for the Standard Oil Company.

Q. 126. Where is that paper you and they signed at that time?

A. I don't know where that is; I had it up here at the court house.

Q. 127. You did sign such a paper with them, in which they agreed to give you the fifty gallons of oil?

A. Simply a due bill which they were to give this oil.

Q. 129. But they signed it as Standard Oil Company agents?

A. Just Rutherford signed it himself; I don't know that it was signed as agent of the Standard Oil Company or not.

Q. 128. But they signed it as Standard Oil Company agents? state if you didn't ask them what assurance you would have that you would get the fifty gallons of oil from the Standard Oil Company, and thereupon they wrote out a paper, or one of them wrote out a paper, and signed it as agent of the Standard Oil Company?

A. I wrote out the paper myself.

Q. 130. And isn't it as agent of the Standard Company, and he signed it as agent of the Standard Oil Company?

A. He signed it; I could not swear about the agent of the Standard Oil Company. Rutherford was good to me.

Q. 131. You were trading with him as agent?

A. He was supposed to be representing it.

Q. 132. Weren't you trading with him as agent of the Standard Oil Company?

Q. 133. And you were not dealing with him in any other capacity except as agent of the Standard Oil Company?

A. That is the only way I knew him, as agent of the Standard Oil Company.

Q. 134. And wasn't it your understanding you were to get that oil from the tanks they had here at that time?

A. Yes, sir; that is the only way I could get it, out of the tank wagon.

66 Q. 135. The Standard Oil was the only oil delivered here at that time?

A. Yes, sir.

Q. 136. How much oil will their large tank over at the depot contain?

A. I don't know how much it contains.

Q. 137. What is your judgment; it is a very large tank, isn't it?

A. I suppose a carload at a time, they could bring in.

Q. 138. How much would that be?

A. It would be simply a guess if I was to guess at it.

Q. 139. About how much?

A. I don't have any idea; thirty thousand gallons, I suppose.

Q. 140. They have quite a large amount of oil stored there all the time?

A. Yes, sir; and they barrel oil over there and ship it out.

Q. 141. And at that time they had a very large amount stored over there?

A. Yes, sir; I think so.

Q. 142. And you understood the oil which you were given to countermand this order, was to be brought to you as you wanted it from that tank over there?

A. Well, that was the agreement we had.

Q. 143. I mean, the oil you were getting from these people was to come from over there?

A. The oil from the Standard Oil Company?

Q. 144. Yes?

A. I didn't care where it came from; it was to be brought in the wagon and delivered at my store.

Q. 145. That was what you understood?

A. I understood they were to deliver it to me as I wanted it.

Q. 146. And they did do it?

A. Yes, sir.

Q. 147. Now, after that, you say that the oil from the Evansville Oil Company was brought to the depot?

A. There was some down here, I don't know how much; I saw some oil down here.

Q. 148. You didn't take yours because you countermanded that order?

A. Nothing was said to me about taking it.

Q. 149. Well, you didn't take it?

A. No, sir; I didn't take it.

Q. 150. Because you had countermanded the order?

A. Yes, sir; I had countermanded the order and supposed it was settled.

Q. 151. Later on the price of oil was put up on you people here by the Standard Oil Company, wasn't it?

67 A. I don't remember exactly; I could tell by referring back to the books.

Q. 152. And after Roseman had been here and sold you oil, the quality of the Standard Oil Company's oil got better?

A. Oil was better, it has been getting better all along; it is good now, very good.

Q. 153. You were asked about the usage and custom of countermanding orders. It is no part of that usage and custom, was it, that a dealer would receive a bonus from another dealer in order to induce him to countermand an order that he had given to a competitor, was it?

A. Sometime a fellow would come in and give you a little, sometimes; something to countermand an order.

Q. 154. Who did?

A. I say they might do it; I never did that way before.

Q. 155. That was the only transaction of that kind you ever had?

A. Yes, sir.

Q. 156. So, that was no part of the usage and custom here in Gallatin?

A. No, sir; I never heard of that being the usage.

Q. 157. What was their reason for giving you this oil?

A. Gave it to me to countermand the order, he said; just said, I will give you fifty gallons to countermand the order.

Q. 158. To keep that oil from being brought here and sold by you in competition with other oil here?

A. I presume so.

Q. 159. That was your understanding with them?

A. That would naturally be my supposition, of course.

Q. 160. That was the supposition and understanding at the time?

A. I guess it was.

Q. 161. They sort of laughed about the way they had cut Roseman out of this territory, didn't they?

A. I never heard anybody say anything about it.

Q. 162. Didn't Rutherford and Holt laugh and talk to you about how they did it?

A. No, sir, not to my knowledge; didn't tell me about it.

Q. 163. Weren't they very jubilant about the way they had knocked the Evansville Oil Company out of this community, up until these prosecutions were commenced in the Circuit Court of Sumner County?

A. I don't know, sir.

Q. 164. Does Holt superintend this territory still?

A. Well, I don't think he does.

68 Q. 165. When did you see him last?

A. I saw him sometime after the fine was sustained against him in the Supreme Court; I don't know what time, some time after that, probably just a few days after the decision was rendered in the Supreme Court, fining him three thousand dollars.

Q. 166. You mean fining him for the transaction in relation to the S. W. Love oil, is that what you refer to?

A. Yes, sir.

Q. 167. You have been asked if you conspired; you didn't enter into any written conspiracy with anybody, did you?

A. I didn't conspire to stop any trade.

Q. 168. I understand that. Has it been suggested to you that you might be indicted for a conspiracy against trade?

A. I never heard anything about that until right here recently.

Q. 169. Who has been suggesting that to you?

A. Well, I don't know; it is the general talk around here.

Q. 170. So, you are pretty sure you didn't conspire with anybody?

A. Mr. Guild there is my lawyer; I went to him and asked him about it, and he told me there was nothing in it.

Q. 171. But you did agree to take these fifty gallons of oil from the Standard Oil Company knowing that their agents were endeavoring to destroy competition with other oil here?

A. I agreed to take the oil all right.

Q. 172. Didn't you agree, Mr. Lane, to take that oil, knowing they were giving it to you to help them destroy competition in the sale of their oil in Gallatin?

A. I didn't think anything about that.

Q. 173. Didn't you know that was what they were doing?

A. I never thought anything about it.

Q. 174. I thought you said awhile ago you understood that was what they were doing?

A. I said I understood; I said I understood that was what they gave it for, to keep the other oil from coming here.

Q. 175. And, hence, to destroy competition?

A. I suppose it would destroy competition.

Q. 176. You knew that, didn't you?

A. As a matter of course it would.

Q. 177. And that is the result it did have:

A. It seems so; we have not had any.

Q. 178. Have not had any competition since then?

A. Not that I know of. Well, yes, there is some oil shipped in here and has been all along; I buy oil myself, outside of the Standard Oil Company.

Q. 179. Not that same kind?

A. A higher grade of oil.

69 Q. 180. A higher grade of oil than they are selling?

A. Yes, sir.

Q. 181. You have to get that from the other people?

A. No, they have a higher grade, too.

Q. 182. But that kind they were selling and your customers were using at that time, you still have to buy from the Standard Oil Company?

A. Well, we do buy; yes, sir.

Q. 183. The Evansville Oil Company has not ventured into this territory since then, has it?

A. Not to my knowledge.

Q. 184. Well, now, you say that oil came here, but nothing was said to you about receiving it?

A. I never heard about it.

Q. 185. You would not have taken it if they had tendered it to you?

A. Not if I could have gotten out of it.

Q. 186. You understood you had countermanded it?

A. Yes, sir.

Q. 187. And you had *a* made a contract not to take it?

A. I made a contract to countermand it, not to take it.

Q. 188. You understood that was what your contract amounted to, you were not to take that oil from the Evansville Oil Company, and to keep your contract with the Standard Oil Company; you could not take it, wasn't that what you understood?

A. I never thought anything about that part of it, because I didn't expect to get that oil.

Q. 189. You didn't expect to take it, either?

A. I didn't expect to get it.

Q. 190. You didn't expect to take it?

A. I didn't expect them to ship it, or didn't expect to have to take it; didn't think anything more about it.

Q. 191. Has the Standard Oil Company ever collected or sought to collect off of you for this fifty gallons of oil given to you to cancel that order.

A. No, sir.

Q. 191. Has Mr. Rutherford or Mr. Holt collected or ever sought to collect off of you the price of that oil?

A. No, sir.

Q. 193. You used it and sold it as your own?

A. Yes, sir; Mr. Rutherford told me that he had to pay for it.

Objection by complainant to what the witness was told, not only because not responsive to the question, but also because hearsay.

Q. 194. How long have you known Mr. Rutherford, Mr. Lane?

A. All my life.

70 Q. 195. How old was he at that time?

A. Why, I suppose he was twenty.

Q. 196. Just a boy?

A. Yes, sir.

Q. 197. Not a man of means or property?

A. Oh, no; just a hard-working boy.

Q. 198. Had no means of his own?

A. None in the world.

Q. 199. Do you know what he was receiving a month?

A. No, sir; it is based on a commission, I believe, as to the business he done.

Q. 200. How long have you known Holt?

A. Well, since I have been in business here, he has been coming up here?

Q. 201. Some five or six years?

A. Yes, sir.

Q. 202. How old a man is he?

A. Just a guess, I would suppose between thirty and thirty-five years old; about thirty or thirty-five.

Q. 203. What is his financial condition?

A. He is just a hard-working man.

Q. 204. Not a man of property?

A. Not that I know of.

Q. 205. Do you know what his salary was at that time?

A. No, sir.

Redirect examination.

By Mr. VERTREE, for Defendant:

Q. 206. You have been asked about Mr. Holt. Do you know what position he held under the Standard Oil Company; do you?

A. Why, he was a salesman, I suppose; I bought candles from him, and he has priced blue-wick stoves to me.

Q. 207. As far as you know, then, he was a salesman?

A. Why, I suppose he was; yes, sir. I know he would come and check up Rutherford.

Q. 208. You don't know what authority or powers he had?

A. No, sir.

Q. 209. You don't know anything about that at all?

A. No, sir.

Q. 210. Now, you have been asked about Rutherford. Did you hear the case that went to the Supreme Court that was tried here in the Circuit Court in 1904?

A. No, sir; I was a witness in the case.

71 Q. 211. Don't you know that the Standard Oil Company obliged Mr. Rutherford to pay them the value of this oil that was given away to you merchants here on that occasion?

A. Do I know it?

Q. 212. Do you know that the Standard Oil Company obliged Rutherford to pay them for the oil which was given to you merchants?

A. He told me he had to pay for it.

Objected to by complainant, because pure hearsay, as witness knows nothing about it of his own knowledge.

Q. 213. You have been asked about your understanding as to the reduction of competition by the transaction which you and Rutherford and Holt had. Now, when you say understanding, in what sense do you use that? Do you use it in the sense you had an agreement or undertaking, or that you inferred that would be the effect?

A. My understanding was with Rutherford and them.

Q. 214. What was the understanding?

A. That I was to countermand the order for the consideration of fifty gallons of oil.

Q. 215. Did you have any understanding with him in any way that this should be done in order to affect the price of oil or reduce competition in oil at all?

A. Nothing said about that.

Q. 216. Was there anything understood about that between you and him?

A. No, sir, I don't suppose there was; there was nothing said about it.

Q. 217. Was there any agreement to that effect?

A. No agreement between us; no, we didn't say anything about conspiring with anybody or anything; that was all that was said; they didn't stay in my store five minutes, no longer than you could write out that agreement and sign it there.

Q. 218. You have been asked as to the understanding that the oil should be delivered to you from the tank. Was there any understanding as to where that oil was to come from?

A. That didn't make any difference; there was nothing said about that; I was to get fifty gallons of oil when I wanted it.

Q. 219. To be delivered in tank wagons?

A. I didn't care how they delivered it, so I got it.

Q. 220. Was there any agreement or understanding where that was to come from?

A. No, sir; nothing said about that.

Q. 221. Or any agreement as to when you should call for it?

A. Only agreement was I was to get the oil.

72 Q. 222. Whenever you wanted it?

A. Yes, sir; that was all there was of it.

Q. 223. You didn't know how much oil they had actually stored at the depot at that time, did you?

A. I don't know.

Q. 224. Whether they had much or little?

A. No, sir; that wasn't none of my business.

Q. 225. You had no knowledge upon that point?

A. No, sir; I know they have a large tank.

Q. 226. And it can hold a great deal?

A. Yes, sir.

Q. 227. And just when a car came in, you don't know?

A. No, sir.

Q. 228. Did your agreement relate to that; that is, the quantity of oil, or the oil down there, in any way at all?

A. No, sir.

Q. 229. Now, you have said that you have bought oil from other persons besides the Standard Oil Company. From whom have you purchased?

A. I have been buying it from Mr. Witherspoon; he gets it at Louisville.

Q. 230. Do you know who he gets it from?

A. No, sir, I don't know; and Mr. Franklin has a higher grade oil he gets from the Standard Oil Company.

Q. 231. What is the difference in price between the two grades?

A. They retail the other at 15 cents, and they want 22½ cents for that.

Q. 232. The oil you sell, the higher grade, what is the difference in that between that and the oil they ordinarily deliver in the tank wagons?

A. What do you mean by that?

Q. 233. You said you got some higher grade oil from Mr. Wither-
spoon?

A. Yes, sir.

Q. 234. What is the difference in price between that oil and the
oil ordinarily sold which is delivered by the Standard Oil Company
from its tank wagons?

A. It is a difference of seven and a half cents a gallon.

Q. 235. So, it is a higher grade oil and a higher priced oil?

A. Yes, sir; it is a better oil, decidedly better.

Q. 236. But it is seven and a half cents higher per gallon?

A. Yes, sir.

Q. 237. Is Mr. Guy Fitzgerald a merchant here?

A. Yes, sir.

Q. 238. Do you know what oil he sells?

A. He is selling the Standard Oil, I suppose; I don't know.

73 Q. 239. You don't know?

A. No, sir.

Q. 240. Do you know how that oil Roseman did sell here com-
pared with the Standard Oil Company's oil?

A. I never saw any of it at all.

Q. 241. You were asked if you were not dealing with Mr. Ruth-
erford and Mr. Holt as agents of the Standard Oil Company. Was
there anything said about that at the time of this transaction?

A. Rutherford signed the order, that was all I know; I don't
know whether he signed it as agent or not. Just as I said before,
I knew he was agent.

Q. 242. And you wanted a paper?

A. He was their representative.

Q. 243. You were asked if they were not very jubilant about
what they had done. In point of fact, did you have any conversa-
tion with Holt or Rutherford, either, afterwards?

A. No, sir; that was all that was said that evening.

Q. 244. Did you have any further conversation with either one
of them on the subject?

A. No, sir.

Recross examination.

By Mr. CATES, Attorney-General:

Q. 245. Mr. Lane, you were asked if you knew how much oil the
Standard Oil Company had down here in its tanks, at that time, and
you said you didn't know?

A. Yes, sir.

Q. 246. It supplies this whole country from its tanks down
there, did it not?

A. Yes, sir.

Q. 247. It barrels oil down there and ships it to other points, did
it not?

A. Points it could not reach with the wagons.

Q. 248. This was a distributing point?

A. Yes, sir.

Q. 249. Where they kept a very large depot or warehouse?

A. They had a very large warehouse, and a very large tank.

Q. 250: Now, as I understand you, previous to Mr. Roseman's visit here, there was no oil being sold in this territory in competition with the oil distributed from this point here by the Standard Oil Company?

A. Not that I know of.

74 Q. 251. Then the oil sold by Roseman here to you merchants was sold in direct competition with that oil, was it not?

A. I suppose so.

Q. 252. And that oil sold to you by Roseman was the oil which these men Holt and Rutherford wanted you to countermand the order for?

A. That was what they wanted me to countermand; yes, sir.

Q. 253. And it was to countermand the order for such oil that they gave you fifty gallons of oil?

A. Yes, sir; there is no question about them giving me the oil.

Q. 254. You stated you bought some oil from somebody else; from some grocer around here in town?

A. Yes, sir.

Q. 255. That had ordered it from distant points?

A. Yes, sir.

Q. 256. No other oil company since then has sent an agent in here to sell oil in competition with the Standard Oil Company's oil or business here at Gallatin?

A. Not that I know of.

Q. 257. You are here in business and nobody has come to see you?

A. Nobody has approached me about it.

Q. 258. Mr. Lane, if you can find the paper that O'Donnell Rutherford or Holt gave you, in relation to the fifty gallons of oil, I wish you would file it with your deposition.

A. Yes, sir.

Further this deponent saith not.

W. H. LANE.

Sworn to when given, and subscribed to before me on this the 18th day of June, 1907.

J. D. G. MORTON,

Clerk and Master Chancery Court.

Filed June 18, 1907. J. D. G. Morton, C. and M. (Trans., Vol. I, p. 203.)

J. E. Cron, called on behalf of defendant, being first duly sworn, deposes as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. 1. State your name, age and residence?

A. J. E. Cron, age sixty-four years, Gallatin, Tenn.

75 Q. 2. How long have you lived here?

A. In the town, seventeen years.

Q. 3. What is your business?

A. Grocery business?

Q. 4. How long have you been in that business at Gallatin, Tenn.?

A. I have been working here for other folks fifteen years.

Q. 5. You are acquainted, then, with the business, its usages and customs and the manner in which it is conducted at Gallatin, Tenn.?

A. Well, I guess so.

Q. 6. Have you been accustomed to deal in coal oil as a merchant?

A. Yes, sir.

Q. 7. How long?

A. Well, I have been doing business for myself seven years; I have been dealing in it myself that long, and the folks I worked for handled it.

Q. 8. What is the usage or custom with reference to the orders given for the purchase of merchandise by the grocers and retail merchants at Gallatin, with reference to the matter of countermanding those orders?

A. Well, I have always countermanded an order if it didn't suit me; I have done it several times.

Q. 9. Is there a custom or usage by which a merchant has a right to countermand orders, provided he does it before it is shipped?

A. Yes, sir; I have always understood it that way.

Q. 10. Was that the case in 1903?

A. Yes, sir; I have never heard to the contrary.

Q. 11. From whom have you been accustomed to purchase oil at Gallatin?

A. The Standard Oil Company.

Q. 12. Well, how have they delivered it?

A. They have brought it up and emptied it into my tank.

Q. 13. Brought it up in what they call tank-wagons?

A. Yes, sir.

Q. 14. And delivered it at your door?

A. Yes, sir.

Q. 15. Which is the preferable and better system of dealing in oil, by barrels shipped or by tank-wagon delivery?

A. By tank-wagon delivery, because you are not bothered with it at all.

Q. 16. How are you bothered the other way when shipped in barrels?

A. If you get it in barrels, you have to go and get the barrel and get you a pump and pump it out into your tank.

76 Q. 17. And haul it from the depot?

A. Yes, sir.

Q. 18. And the leakage is troublesome?

A. Of course it is troublesome.

Q. 19. Sometimes the quantities are not always there when it comes in barrels?

A. I don't know, sir; I never bought any in barrels.

Q. 20. You regard the other, then, as far more convenient and advantageous?

A. Yes, sir; I did buy some in some five-gallon cans twice, and that was a right smart trouble; I had to send to the depot and get it and bring it up and empty it out.

Q. 21. How did you get that; who did you buy that from?

A. From the Kentucky Consumers Oil Company.

Q. 22. That is not the Standard Oil Company?

A. No, sir.

Q. 23. Then, as I understand you, you bought from them and to be shipped in five-gallon cans?

A. Yes, sir.

Q. 24. You say that was not satisfactory?

A. Not to me it was not, because I had to send to the depot and haul it up and empty it out of the cans into my tank, and I didn't like that trouble.

Q. 25. Do you recollect the time when the Evansville Oil Company came in and took some orders here at Gallatin?

A. It was in September, 1903, I believe.

Q. 26. Did you give an order to their representative?

A. Yes, sir.

Q. 27. Who was he?

A. Well, I could not tell you what his name was. Well, I can, too; I have got his name here on my order slip.

Q. 28. Is this a copy of the original order slip?

A. Yes, sir; that is a copy of it.

Witness here produces order slip, which he says is a copy of the original order.

Q. 29. So it was on September the 6th or 16th that you gave him an order for ten barrels of oil to be shipped November 1st?

A. Yes, sir.

Q. 30. Price, 14½ cents per gallon, ten empty barrels ten dollars, and one dollar for empties, f. o. b., Gallatin. Guaranteed against leakage until emptied and to be paid for as used, we to pay inspection. Signed, C. E. Roseman. That is the man, is it?

A. I reckon so.

Q. 31. And you did give him that order?

A. Yes, sir.

77 Q. 32. Did you ever countermand that order?

A. Yes, sir.

Q. 33. If so, when?

A. I think it was about the 2d of October. I don't know exactly; I have that set down somewhere, but I could not find it.

Q. 34. State the circumstances under which you countermanded it?

A. Well, I was going to countermand the order and Mr. Holt came up to see me that morning and he insisted mightily I should countermand the order; wanted me to countermand it on account of O'Donnell being a boy of the town, and of course I felt sorry for O'Donnell, and had recommended O'Donnell, when Mr. White-

sides went out, for he had carried the oil around for Whitesides, and I told him I was going to countermand the order that night; had it in my head to countermand it.

Q. 35. You say you had recommended O'Donnell Rutherford for the place?

A. Yes, sir; for he done all the delivering of the oil while Mr. Whitesides had it, and I thought he was used to it and was a good boy, and wanted to help him out all I could.

Q. 36. And you say Mr. Holt's approach was first on that basis?

A. Yes, sir.

Q. 37. You say you had made up your mind to countermand the order?

A. Yes, sir; I was going to countermand it that night.

Q. 38. Why?

A. Because I had acted foolish in paying the price, in paying the price I had, and then all the trouble I had to get it up to my store; I was mad when I gave the order.

Q. 39. What were you mad about?

A. I had had a good many customers kicking about the quality of the oil.

Q. 40. The Standard Oil Company's oil?

A. Yes, sir; about having water in it, and it fretted me.

Q. 41. How long had that grumbling been going on?

A. It had been several times, and then it would get better; I think the first grumbling I had was in November or December before.

Q. 42. That was the first?

A. I think that was the first grumbling I had, and the next I think was in June or July of that year, or might have been in August; I don't recollect exactly; they were grumbling mightily about the oil again that year.

Q. 43. What was the trouble?

A. They claimed it had water in it.

78 Q. 44. Would not burn?

A. Would not burn.

Q. 45. Were you using that same oil?

A. Yes, sir; I used it all the time.

Q. 46. Mine burned.

Q. 47. In other words, that complaint, so far as you knew or could see, was not well founded?

A. I knew it burned all right at my house.

Q. 48. Were you burning the same oil you sold the other people?

A. Yes, sir; I don't know of any other kind of oil?

Q. —. What did Holt say, if anything, that he would give you to countermand the order?

A. He offered to give me a hundred gallons of oil if I would countermand.

Q. 50. Was Rutherford with him?

A. No, sir.

Q. 51. Well, did you agree to that?

A. I told him I was going to countermand the order anyhow,

that was in the morning, and came back at dinner time and said I would not get the oil anyway, and I said I had been bothered and deviled so much that the hundred gallons would pay me some for my trouble, and I would take it.

Q. 52. Did he write out an order countermanding it?

A. Yes, sir.

Q. 53. A telegram?

A. Yes, sir.

Q. 54. And gave it to you to sign?

A. Yes, sir.

Q. 55. And gave it to him to send?

A. Yes, sir; he wanted me to send it, and I told him I would write it, the telegram, and he could send it if he wanted to; if he wanted to pay for it, that was all right.

Q. 56. And the trade was made, the order given to their traveling man here at Gallatin?

A. Yes, sir.

Q. 57. Where was the oil to be shipped from?

A. Evansville, Indiana.

Q. 58. Now, after you sent in that telegram, as you have described, did they ever come back at you and demand you should take the oil?

A. Yes, sir; they come back and wanted to know why I countermanded it.

Q. 59. Did they come back and demand that you should take the oil?

A. No, I don't think they ever demanded I should take the oil.

79 Q. 60. He wanted to know why you countermanded it?

A. I don't know sir; I don't know the man's name.

Q. 61. You told him why, did you?

A. Yes, sir.

Q. 62. Do you remember when that was?

A. No, sir; I don't know exactly when it was.

Q. 63. Do you know when that shipment of oil of theirs did get to Gallatin?

A. No, sir, I don't know of that, for I was not concerned in it and didn't bother myself about it; I think it came, though, about the time it was to come, about the first of November.

Q. 64. Wasn't it after the 1st of November, and before the 5th?

A. Somewhere along there.

Q. 65. Did you see any of that oil?

A. No, sir; I never seen none of it.

Q. 66. At what price were you to pay for it, the price?

A. Fourteen and a half cents a gallon.

Q. 67. What were the prices the Standard Oil Company was selling its oil at, delivered at the doors, in the wagons?

A. Thirteen and a half cents.

Q. 68. Was there any change made in the price about that time or a little later?

A. A little later there was; I think the oil advanced a little after that.

Q. 69. What has been the rule of the prices of oil by the Standard Oil Company for years, about the fluctuations?

A. It goes up sometimes and down sometimes; been up as high as 14½ cents and then down to 11 cents.

Q. 70. About how often, on an average in the year, does the price change?

A. Well, two or three years ago it changed several times during the year, but for the last two years I reckon it is, it has not changed so much, not so many times; I could not tell exactly without looking it up.

Q. 71. More than once in a year?

A. Yes, sir; sometimes changed twice; goes up a little and then down again; I don't think it has changed now in eight or ten months.

Q. 72. What is it now?

A. It is 11 cents.

Q. 73. Well, now, Mr. Cron, did you enter into any agreement with anybody looking to the suppression of competition in any way in oil at that time?

A. No, sir; I never thought of such a thing.

80 Q. 74. Or to advance the price of oil?

A. No, sir.

Q. 75. Did you go into any agreement or understanding with anybody to do that?

A. No, sir.

Q. 76. What did you have to do or know of the countermanding of the orders by Mr. Lane and Mr. Love and Mr. Hunter; do you know anything about that?

A. Mr. Hunter told me that they had countermanded the—I mean, Mr. Holt told me that they had countermanded the orders when he came back the second time; told me he had given Mr. Love 100 gallons, and would give me a hundred gallons.

Q. 77. He gave you that piece of information?

A. Yes, sir.

Q. 78. Had you seen any of those gentlemen on the subject?

A. I seen Mr. Lane that evening after the second time.

Q. 79. And asked him if it was true?

A. Yes, sir.

Q. 80. What I mean is, whether there was any agreement or understanding between you merchants about it?

A. No, sir; no agreement; I never seen anybody, but Will Lane happened to pass by there.

Q. 81. When was this hundred gallons to be delivered?

A. No time set; nothing said about that.

Q. 82. It meant whenever you wanted it you would call for it?

A. That night, after he came back, he brought O'Donnell Rutherford in the house and told him to deliver me a hundred gallons.

Q. 83. Still, there was no agreement when it was to be delivered?

A. It was delivered right straight along after that.

Q. 84. Who delivered it?

A. O'Donnell Rutherford.

Q. 85. Were you and Holt together when you made the trade, and was Rutherford there when you made the trade?

A. No, sir; he wasn't with Holt at all.

Q. 86. Did you see him with him there at either time or any time?

A. No, sir; never seen him until Holt came up there with him that night.

Q. 87. You say he and Mr. Holt came up there that night?

A. Yes, sir.

Q. 88. Did you have any knowledge at that time about the Standard Oil Company's business; how much oil it had or where it had it?

A. No, sir; I didn't know about how much they had or where they had it, or anything about it.

81 Q. 89. Did your agreement relate to the oil they then had on hand or the oil they might have whenever you wanted yours, wherever it might come from?

A. No, sir; nothing said about that, just told O'Donnell to put me in a hundred gallons of oil.

Q. 90. No agreement as to time?

A. No, nothing said about that.

Q. 91. And was it to be delivered from tank wagons at your store?

A. Yes, sir.

Q. 91½. Was there any agreement whether it was to be oil already at Gallatin or oil to be brought to Gallatin, or anything of that kind?

— — —
Q. 92. Do you know, or did you know, how much or how little oil they had stored at that moment in Gallatin?

A. No, sir; I don't know anything about that.

Q. 93. Did your agreement relate to oil that was stored or oil that they were to deliver to you?

A. No, sir; didn't relate to nothing; only he was to put me in a hundred gallons of oil.

Q. 94. And he did do it?

A. Yes, sir.

Q. 95. Did you hear that trial of the Love case?

A. No, sir.

Cross-examination.

My Mr. CATES, Attorney-General:

Q. 96. The Standard Oil Company, when Roseman first came into this territory, was the only company selling oil here, wasn't it, Mr. Cron?

A. Yes, sir; the only company selling oil that I know anything about.

Q. 97. They used Gallatin here, their warehouse and depot, as sort of a distributing point?

A. Yes, sir; I think they did distribute it all over the country around here.

Q. 98. You have been asked about the custom or usage among merchants relative to countermanding orders. I want to ask you whether or not it is a part of that custom that persons receive a bonus for countermanding orders?

A. I have never heard of nothing of that kind in my business.

Q. 99. This deal of yours with Holt is the only transaction of that kind you have had?

A. Yes, sir; he gave me that hundred gallons of oil.

82 Q. 100. I understand you say he gave it to you?

A. Yes, sir.

Q. 101. Have you there in the book which you have in your hands the date on which you had that conversation with Holt?

A. No, sir; I have not.

Q. 102. It was after he had secured the countermands from Mr. Love and Mr. Lane, was it not?

A. Yes, sir; at least that is what he said.

Q. 103. Now, when he first came to your store he began to entreat you to countermand the order because of Rutherford, didn't he?

A. Yes, sir.

Q. 104. And later on he offered you fifty gallons of oil to countermand your order?

A. Yes, sir.

Q. 105. And you held out for a larger amount, didn't you?

A. Yes, sir.

Q. 106. And it wasn't on account of Rutherford, but on account of this larger amount you got from him that you agreed to countermand the order?

A. No, sir; I was going to countermand it that night.

Q. 107. You had never countermanded it up to that time?

A. No, sir.

Q. 108. And would not agree to countermand it on account of Rutherford?

A. Yes, I told him I was going to countermand it.

Q. 109. You would not agree to countermand it for fifty gallons?

A. I told him all the time I was going to countermand it.

Q. 110. You first asked for fifty gallons?

A. No, sir; I didn't ask for fifty.

Q. 111. He offered you fifty gallons first?

A. Yes, sir.

Q. 112. And you would not accept the fifty?

A. Yes, sir.

Q. 113. But you, in the meantime, heard Mr. Love had gotten a hundred?

A. Yes, sir.

Q. 114. And you wanted the same Love had gotten?

A. Yes, sir.

Q. 115. For doing the same thing?

A. Yes, sir.

Q. 116. And then it was you agreed to send the telegram, to sign the telegram, and signed it provided he would pay the expenses?

A. No, sir; I offered to countermand it that night, and was going to countermand it that night, and he made the proposition himself to send the telegram.

83 Q. 117. Then why did you hold out for a hundred gallons when he offered you fifty?

A. Because I thought a hundred would pay me better than fifty for my trouble.

Q. 118. Why did you say he offered you fifty at first?

A. I don't know; I never asked him why.

Q. 119. Then he gradually climbed up to a hundred?

A. Yes, sir.

Q. 120. And when he got up to a hundred, you said you would take that amount; isn't that so?

A. Yes, sir; I told him I would take a hundred gallons.

Q. 121. Because you were going to stick out for the same Mr. Love had gotten?

A. I always take anything anybody offers to give me.

Q. 122. Now, you have said there was no conspiracy or sort of agreement between you gentlemen?

A. No, sir.

Q. 123. You have heard a great deal about conspiracies in restraint of trade, haven't you?

A. Here lately?

Q. 124. Since this had been stirred up?

A. Yes, sir; I have heard a little.

Q. 125. It has been suggested you might be a party to an indictment in a conspiracy in restraint of trade?

A. Yes, sir; I have heard something in regard to it.

Q. 126. This oil that was received, have you anything there to show when you got it?

A. No, sir; I haven't got anything to show when I got it.

Q. 127. Didn't he tell you why he was offering you that one hundred gallons of oil to make it sure you would not take that oil from the Evansville Oil Company?

A. Oh, yes; he wanted me to countermand that order, of course.

Q. 128. And that was the reason he gave you the hundred gallons, wasn't it; didn't he say so?

A. He said he wanted me to countermand the order on account of O'Donnell.

Q. 129. But then he began to offer you fifty gallons?

A. Yes, sir.

Q. 130. And afterwards got up to a hundred gallons?

A. Yes, sir.

Q. 131. Now, for what purpose was that?

A. It was to get me to countermand that order, I reckon.

Q. 132. To countermand the order?

A. Certainly, I reckon.

84 Q. 133. Didn't he tell you at the time that you did that, and he could get all these orders countermanded, he could keep these people out?

A. He told me the second time that it would not come; that he had enough countermanded, they would not ship it here.

Q. 134. And he had gotten the countermands in order to keep that oil from coming into this territory?

A. I reckon so, I don't know.

Q. 135. Didn't he tell you so?

A. He told me it would not come.

Q. 136. Didn't he tell you that was the purpose for which he was securing these countermands?

A. No, sir; he didn't tell me that; he said the oil would not come.

Q. 137. You have not had any competition since that, have you?

A. I have ordered oil from the Kentucky Consumers Oil Company.

Q. 138. No agent has come here selling it since that?

A. Yes, I bought that from an agent.

Q. 139. Who was it?

A. I don't know his name.

Q. 140. When?

A. I don't know; I received the bill the first of October and gave the order some time before that.

Q. 141. I am talking about since you gave this countermand?

A. That has been since I gave the countermand.

Q. 142. Are you sure about that?

A. I know it, sir.

Q. 143. Have you any data from which you state you made the countermand before that?

A. No, sir; I have got it somewhere, but I don't know where it is, but I made the countermand in 1903, and I ordered this other oil in 1904.

Q. 144. Give me the name of the man you bought that oil from?

A. I can't give you the name without I hunt up the slips.

Q. 145. Was he working this territory regularly?

A. Yes, sir; he was through here several times; was here in my store twice.

Q. 146. Did he get in here more than once?

A. I bought from him twice.

Q. 147. What was his name?

A. I don't know, sir.

Q. 148. You don't know his name?

A. No, sir.

Q. 149. The Standard Oil Company of Kentucky?

A. It was the Kentucky Consumers Oil Company.

85 Q. 150. You don't know whether it was connected with the Standard Oil Company or not?

A. No, sir; I don't know whether the Evansville Oil Company was connected with them or not.

Q. 151. Now, you say prior to the time Mr. Roseman came here

there had been a great deal of complaint about the oil of the Standard Oil Company?

A. Yes, sir.

Q. 152. It had been almost general for a year?

A. I don't know whether it was general for a year, but there had been a great deal of complaint, commencing in November or December before, and I had complaint in July or August, somewhere along there.

Q. 152. It wasn't confined to the immediate time Roseman was here, but antedated that as much as the previous September?

A. Yes, it was before that time, for if I hadn't been mad, I would not have given that order I did give.

Q. 154. The Standard Oil Company, it just fixes the price you pay for it, out of the tanks, don't they?

A. Yes, sir; and all the balance of them.

Q. 155. I am talking about the Standard Oil Company?

A. Of course they fix it.

Q. 156. And when they fix the price, you pay it, don't you?

A. Certainly.

Q. 157. Now, isn't it a fact you understood this oil Holt contracted to give you was to come from this oil over at the depot from the Standard Oil Company?

A. No, I didn't know where it was coming from?

Q. 158. You knew it was the Standard Oil?

A. Yes, sir.

Q. 159. Did you know that?

A. Yes, sir.

Q. 160. Did you know you got it?

A. Yes, sir.

Q. 161. Have they ever attempted to collect anything off of you for it?

A. No, sir.

Q. 162. Has Holt or Rutherford attempted to collect anything off of you for it?

A. No, sir.

Q. 163. You could have gotten it the next day, couldn't you, or that very day, couldn't you?

A. I don't know whether I could or not; I didn't have any use for it that day.

86 Q. 164. Wasn't the tank going around at that time?

A. Yes, sir; about once a week.

Q. 165. What is the size of their storage tank, the big one?

A. I don't know, sir; I don't know anything in the world about that.

Q. 166. I suppose it is a very small one, about the size of a barrel?

A. I don't know whether it is or not.

Q. 167. Haven't you seen it?

A. Yes, sir.

Q. 168. About what are its dimensions?

A. I don't know, sir.

Q. 169. Is it as big as a barrel?

A. Yes, sir.

Q. 170. Big as a hogshead?

A. Bigger than several.

Q. 171. What do you suppose it would hold?

A. Four or five or six hundred barrels, I guess; they have got two, I believe.

Q. 172. Keep oil over there to barrel and ship to other points?

A. I don't know what they do; I don't bother with their business.

Q. 173. Have you talked with the attorneys of the Standard Oil Company as to what you would testify in this case?

A. No, sir.

Q. 174. Have not?

A. No, sir; I have not.

Q. 175. They put you on the stand without talking to you?

A. They talked to me some.

Q. 176. That is exactly what I asked you.

By Mr. VERTREES:

Why do you ask that, General?

By Mr. CATES, Attorney-General:

Q. 177. For this: Then Mr. Guild went to you and asked you about your testimony, and you declined to talk to him?

A. Yes, sir; yesterday morning; and I told him I would tell him up here, and seems he has sort of got it in for me about it.

Q. 178. We wanted the facts?

A. That is what I will tell.

Q. 179. The fact is you talked to the attorneys for the Standard Oil Company and would not talk to the counsel for the State?

A. The counsel for the State had my evidence in a book here and knew what it was.

Q. 180. Such is the fact?

A. That is the reason why; he had it.

87 Redirect examination.

By Mr. VERTREES, for Defendant:

Q. 181. Didn't you testify in the Love case, Mr. Cron?

A. Yes, sir.

Q. 182. When the Love case was tried?

A. No, I didn't have nothing to do with it.

Q. 183. You testified before the grand jury?

A. Yes, sir.

Q. 184. When notice was given to take your deposition, did attorneys for the State begin to run around to see witnesses?

A. No, sir; Mr. Guild was the first one that came to see me.

Q. 185. You declined to talk to him?

A. Yes, sir.

Q. 186. Notice had been given to take your deposition up here to-day, had it?

A. Yes, sir.

Q. 187. And Mr. Vertrees and Mr. Blackmore, as counsel, called you to Mr. Blackmore's office and asked you about what you knew in the suit, is that correct?

A. Yes, sir.

Q. 188. Do you know who else Mr. Guild went to see?

A. No, sir; that is not my business.

Q. 189. Do you know whether or not the Attorney-General sent him or not?

A. No, sir; I don't know that, either; I didn't ask him.

Q. 190. Now, you say it has been suggested you are liable; who first suggested you will be liable to prosecution?

A. The State, I guess; I don't like any such suggestions, either, for I don't propose to do anything wrong myself.

Q. 191. Now, you were asked if when Mr. Holt first came at you he offered you fifty gallons, and gradually increased to a hundred. What I want to know is, did he offer you fifty, then sixty, seventy, eighty, ninety and a hundred, or offer you fifty and then a hundred?

A. Offered me fifty, and when I told him I would not take fifty, offered to give a hundred.

Q. 192. What I mean is, there was no dickering or climbing along in there, was there or not?

A. No, sir.

Q. 193. Now, you have been asked whether or not Mr. Holt wanted to keep these people out of here, out of this territory. I will ask if any statement was made like that by Holt at any time or not?

A. No, sir; not keeping anybody out.

88 Q. 194. Didn't he say that orders had been countermanded enough, or to the extent that that car load would not be shipped in, and that car load would not come anyway?

A. Yes, sir; that is just what he told me when he came back the second time, and I thought I would take the hundred gallons to pay me for my trouble and all.

Q. 195. And he delivered it to you?

A. Yes, sir.

Q. 196. And never asked you to pay for it?

A. Yes, sir; he delivered it to me and never asked me to pay for it.

Recross-examination.

By Mr. CATES, Attorney-General:

Q. 197. Has the Standard Oil Company ever collected off of you or called on you for the price of the oil thus delivered to you?

A. No, sir.

Q. 198. And neither Rutherford nor Holt has called on you for the price of the oil, have they?

A. No, sir; neither one of them.

Q. 199. How old is O'Donnell Rutherford, Mr. Cron?

A. Could not tell you to save my life.

Q. 200. He was a mere boy at that time?

A. Yes, sir; he was a mere boy.

Q. 201. Didn't have any financial standing or responsibility?

A. No, sir, and he worked for Jim Whitesides, and all in the delivery, and he had a widowed mother and two nice sisters, and lived close to me, and when Jim went out and he came around, asked me to sign his paper, and I thought he had been faithful—

Q. 202. What I wanted to find out is, whether or not he had any financial responsibility?

A. No, sir; had none I know of.

Q. 203. He was working on a salary here for the Standard Oil Company?

A. Yes, sir, and he was working for Jim Whitesides when he got that.

Q. 204. I mean, at the time of the transactions we have been discussing here?

A. Yes, sir; he was working on a salary.

Further this deponent saith not.

J. E. CRON.

Sworn to when given, and subscribed before me on this the 18th day of June, 1907.

J. D. G. MORTON,
Clerk and Master of the Chancery Court.

89 Filed June 18, 1907. (Trans., Vol. I, p. 238.)

L. C. HUNTER.

Said witness, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. 1. State your name and age and your residence?

A. L. C. Hunter, age twenty-eight, residence Hendersonville, Tennessee—Sumner County, Tennessee.

Q. 2. How long have you lived at your present place of residence?

A. Nearly three years.

Q. 3. Where did you live during the months of September and October and November, 1903?

A. At Bethpage, Sumner County, Tennessee.

Q. 4. In what business were you then engaged?

A. Mercantile business.

Q. 5. Where?

A. At Bethpage, Tennessee.

Q. 6. Were you at that time a dealer in coal oil?

A. Yes, sir; I was selling some oil.

Q. 7. From whom did you purchase, or were you accustomed to purchase oil?

- A. Why, the Standard Oil people.
- Q. 8. How was it delivered to you?
- A. By wagon.
- Q. 9. What is called a tank wagon?
- A. Why, I suppose so.
- Q. 10. From what point?
- A. Gallatin, Tennessee.
- Q. 11. Are you acquainted with a man by the name of Roseman, a representative of a company called the Evansville Oil Company?
- A. I met him only one time.
- Q. 12. When and where was that?
- A. That was at Bethpage, my place of business; I think it was in the month of September, 1903.
- Q. 13. What passed between you and him; what transaction, if any, took place?
- A. Why, I bargained with him for six barrels of coal oil.
- Q. 14. At what price?
- A. I don't remember the price; I don't remember.
- Q. 15. Was it more or less than the price then paid by you, which you were then paying the Standard Oil Company?
- 90 A. It was a little more than the last oil I had bought from the Standard people.
- Q. 16. What were the terms; how was it to be delivered?
- A. Why, it was to be delivered at Gallatin in a car, in six weeks from date of sale; that is, it was to be shipped in six weeks.
- Q. 17. As I understand you, it was to be shipped in six weeks?
- A. Yes, sir; from their shipping point; they could not, of course, tell what time it would get here.
- Q. 18. Where were you to receive it, at your place of business or at Gallatin?
- A. Why, at Gallatin; I think I was to haul it.
- Q. 19. So, the expense of hauling it from Gallatin to your place of business was to be borne by you?
- A. Yes, sir.
- Q. 20. How far distant were you from Gallatin?
- A. Well, approximately ten miles.
- Q. 21. What about the barrels?
- A. If I remember correctly, I was to pay them six dollars for the six barrels, with the privilege of returning them to the company at the same invoice price, when they were empty.
- Q. 22. But wasn't that price, namely, the price of the barrels, additional to the price of the oil?
- A. I think it was; I could not swear positively that was true or not, but I think it was, though; six dollars extra, outside of the price of the oil.
- Q. 23. Did you receive the oil?
- A. No, sir; I didn't receive it; I don't know whether it was shipped or not.
- Q. 24. Did you, or not, countermand the order?
- A. Yes, sir; I countermanded it.

Q. 25. How long after you gave the order before you countermanded it?

A. I don't remember the exact time, but as well as I remember it was about a couple of weeks, possibly.

Q. 26. What were the representations made by Mr. Roseman to you to induce you to buy that oil?

Complainant objects to any representations made by Roseman to this witness to be proven by this witness, because the same would be purely hearsay.

Objection overruled; appeal taken.

A. Well, in the first place, I had been in the business since the 25th of June, 1903; as well as I remember that was some time between the 1st and 15th of September, but I could not say positively about the dates, and there was some kick on the Standard Oil Company's goods at that time when Roseman came around, not
91 only at my place, but those places up there where I was acquainted with, by the merchants that handled the Standard Oil Company's Oil, so, having some kicks on the oil, and of course, as far as possible, I wanted to give the people something that would please them and satisfy them, and I don't suppose I had, I wasn't supposed to have a great deal of judgment right at that time, had been in business only a short time and never had been in business before for myself, and I asked him if Mr. E. Franklin & Son over here, I think it was, and the Lucas Grocery Company, I don't know whether that was the name of it at that time, but that was the place, those two fellows, I thought they had been handling oil long enough and were upright gentlemen and wanted to handle something good, and I asked Mr. Roseman if he had sold those two gentlemen, and he said he had, and I never thought one time to call on him for the duplicate orders, and consequently I didn't find out until after he was gone, and until several days after that, that he had not done so or not, and in a short time I found that he had not sold those two parties the oil.

Q. 27. Did you, or not, countermand your order.

A. Yes, sir.

Q. 28. How did you do that, by letter or telegram, or how?

A. It was by telegram.

Q. 29. Well, state the circumstances.

A. Well, before I had countermanded it, I had been thinking very seriously about it, because I didn't know but what he was a fake, and but what the company was a fake, and he had misrepresented this other thing to me about these other two people buying oil, and I didn't know but what he had misrepresented the thing all the way through, and I had no recourse on him to find out then whether he was a fake, right there and then, and consequently I began to think about it pretty seriously, and the more I thought about it the worse I became dissatisfied with the purchase, and Mr. Holt, that is the Standard Oil Company's general agent, isn't he? he came up there and I don't remember whether he raised the subject or whether I mentioned it to him, I could not say; but, anyway, I told

him what I had done, and was thinking about countermanding it before Mr. Holt ever opened his mouth to me in regard to it at all, and he told me if I wanted to countermand it, I will just write the countermand for it and you sign it, and I will send it for you, just save you that quarter. Well, I didn't do it right away, because I didn't want to do anything wrong about it, if the man had not mistreated me; I didn't want to mistreat him, and I studied the thing over thoroughly and finally decided to countermand the order; I think I had something like four weeks before it was to leave its shipping point, and so he wrote the countermand and I signed it, but whether it went off or not I don't know.

92 Q. 30. Did he agree, or promise, to give you anything for doing that?

A. No, sir; not until after the countermand was written and signed, and then he said, Hunter, I am going to give you fifty gallons of oil.

Q. 31. Where did that take place?

A. Bethpage, Sumner County, Tennessee.

Q. 32. And did you get the oil?

A. I sure did, and I would have liked to have had a hundred.

Q. 33. You say that was after the order of countermand was signed that he made you that statement and promise?

A. Yes, sir; that is true. You will find that so in the statements made by me before the grand jury.

Q. 34. Did they take your statement down in the grand jury?

A. I suppose they did.

Q. 35. You were before the grand jury?

A. Yes, sir; twice.

Q. 36. In regard to this matter?

A. Yes, sir.

Q. 37. Now, according to the usage of the trade, did you have a right to countermand the order at any time before it was shipped out?

A. Why, if I had not, I would not have done it.

Q. 38. Did you ever enter into any agreement or arrangement or combination or conspiracy with Mr. Holt, or Mr. Cron, a merchant of this city, or Mr. W. H. Lane, a merchant of this city, or Mr. S. W. Love, a merchant of this city, or anybody else?

A. In regard to that matter?

Q. 39. In regard to that countermand?

A. No, sir.

Q. 40. Or in regard to any other matter looking to the reducing of competition in the sale of coal oil at Gallatin, Tennessee?

A. No sir; that was not any of my business, and I didn't see any of the parties, I don't think; I am pretty sure I did not, except Mr. Holt that day he came there; the other parties I didn't see nor communicate with them.

Q. 41. At any time?

A. At no time.

Q. 42. Did you enter into any agreement or combination with

them, or of any of them, looking to advancing the price of oil to the consumers in your neighborhood or at Gallatin?

A. No, sir.

Q. 43. Or looking to the reduction of the sale of coal oil that the Standard Oil Company had at Gallatin at that time?

A. No, sir.

93 Q. 44. Did you with regard to oil they had anywhere else?

A. No, sir.

Q. 45. Did anything of that kind happen?

A. No, sir.

Q. 46. Do you know the fact that the case called the S. W. Love case, growing out of a transaction with Mr. Holt and him, was tried in Sumner County here, some years ago, in Sumner County?

A. No, sir; I don't know that to be an absolute fact.

Q. 47. What I was getting at was, were you examined as a witness in that case?

A. Yes, sir; I was sworn in.

Q. 48. Were you examined before the jury?

A. No, sir; I wasn't on the stand at all.

Q. 49. Were you examined as a witness in that case?

A. No, sir.

Q. 50. You say you had been before the grand jury?

A. Yes, sir.

Q. 51. Were you sworn and put under the rule in that case?

A. Yes, sir.

Q. 52. As a witness in the Love case?

A. Yes, sir.

Q. 53. You attended the trial?

A. Yes, sir.

Q. 54. But were not examined?

A. No, sir; after the trial began I came in and took my seat right on in the audience there for a few minutes and then somebody came in—

Q. 55. But the point is, you were not called and examined as a witness before the grand jury?

A. No, sir.

Q. 56. Were you put under the rule in that case and sent out?

A. Yes, sir; part of the time I was.

Q. —. Were you sworn?

A. Yes, sir; sworn only one time.

Q. 58. Now, when you say one time, do you refer to the time you went before the grand jury?

A. No, sir; in here in the courthouse.

Q. 59. At the time of the trial?

A. Yes, sir.

Q. 60. Was that before or after you had been before the grand jury?

A. That was afterwards.

94 Cross-examination,

By Mr. CATES, Attorney-General:

Q. 61. You say, Mr. Hunter, that you went before the grand jury?

A. Yes, sir.

Q. 62. And you were examined before the grand jury?

A. Yes, sir.

Q. 63. Do you know if an indictment was found on your testimony?

A. I don't know anything about it, only what I heard.

Q. 64. How long had you been in business prior to the time of this transaction with Roseman?

A. Why, from the 25th of June, 1903, until, I think it was some time in September.

Q. 65. So, you were rather young in the mercantile business then?

A. Why, then; yes, sir.

Q. 66. Not very familiar with any customs that might be in vogue with reference to that business, were you?

A. No, sir; I didn't propose to be; it was my first attempt at it.

Q. 67. Now, the Standard Oil Company had oil stored in its tanks down here at Gallatin, at that time?

A. I don't know.

Q. 68. You hadn't bought any oil?

A. Yes, sir.

Q. 69. From whom had you purchased oil?

A. The Standard Oil Company.

Q. 70. You had been using the oil of the Standard Oil Company exclusively?

A. Yes, sir; out of the wagon.

Q. 71. When I say you had been using the oil of the Standard Oil Company exclusively, I mean, you had been selling it there exclusively, in your business?

A. Yes, sir.

Q. 72. And that you purchased from the tank wagons of the Standard Oil Company?

A. Yes, sir.

Q. 73. That was sent out from Gallatin to your place?

A. Yes, sir.

Q. 74. Now, what were they selling the oil at, at that time?

A. Well, now, I could not tell you.

Q. 75. To refresh your recollection, I will ask you if they were selling tank oil at 13½ cents a gallon; weren't they?

A. I don't know.

95 Q. 76. There was no other oil company doing business here in Gallatin at that time?

A. I don't know.

Q. 77. You say this oil that you had been purchasing exclusively of the Standard Oil Company, and selling to your customers, proved to be very inferior grade of oil?

A. Well, I don't know; I didn't say very inferior, but it was not good, so the people said.

Q. 78. Now, not a good grade of oil?

A. I had some complaint about it.

Q. 79. So, when Roseman came around and offered you oil at 14½ cents a gallon, you bought from him? Ordered six barrels?

A. I don't remember the price, but I reckon you gentlemen know the price.

Q. 80. It was slightly over what you had been paying for the oil from the Standard Oil Company?

A. Something like a cent, but I could not swear positively.

Q. 81. Now, you stated in response to a question on direct examination, that in addition to the amount per gallon which you paid him, you paid him also one dollar per barrel, or agreed to pay that?

A. Yes, sir.

Q. 82. Now, as a matter of fact, you were to get credit on the barrels returned for one dollar on each?

A. Yes, sir; just balancing the two-barrel accounts.

Q. 83. You say you had been thinking of countermanding this order?

A. Yes, sir.

Q. 84. But your thought didn't get to the extent of writing a countermanding order until Mr. Holt, the agent of the Standard Oil Company, came to your place of business?

A. It hadn't been written until then.

Q. 85. That is what I am asking. You say you had made no effort to countermand the order until he came?

A. Not in the way of writing.

Q. 86. You had made no effort whatsoever to countermand the order until Mr. Holt came there that day?

A. I don't remember just about that.

Q. 87. You had not sent the Evansville Oil Company, which Roseman was representing, any letter countermanding the order?

A. No, sir; that wasn't necessary.

Q. 88. You hadn't sent them any telegram countermanding the order?

A. No, sir.

Q. 89. You hadn't given any agent notice of what was floating around in your mind, in reference to a countermand?

A. No, sir; I had not.

96 Q. 90. Now, do you know the purpose for which Holt came to your place of business that day?

A. No, sir; I do not.

Q. 91. You say he was the general agent of the Standard Oil Company?

A. That was my understanding.

Q. 92. That was what he represented himself to be?

A. Yes, sir.

Q. 93. He didn't offer to sell you any oil?

A. That day?

Q. 94. Yes?

A. I don't remember.

Q. 95. He wasn't an oil salesman, was he; he was in charge of their business in this territory?

A. He came around ever so often and kind of adjusted things, if anything had gone wrong; I suppose he would have sold oil, I could not tell whether I bought any direct from him or not.

Q. 96. He didn't offer to sell any that day?

A. I don't remember whether he did or not.

Q. 97. The only transaction you had with him was that he agreed to give you fifty gallons of oil, which was delivered to you?

A. Yes, sir; that took place after all the countermand was signed up.

Q. 98. I understand you are very careful to say it all occurred after the countermand was signed up, but it was the same day that the countermand was delivered to him to be sent to the Evansville Oil Company?

A. That was what he said he was going to do with it, send it to them.

Q. 99. Holt himself wrote out the telegram you turned over to him to send?

A. I think he did.

Q. 100. And you signed it?

A. Yes, sir.

Q. 101. You didn't pay for sending it?

A. No, sir; I stated that awhile ago.

Q. 102. And your understanding was Holt was to pay for sending that telegram to the Evansville Oil Company?

A. I told him what actually occurred; he may have been informed before he got to me.

Q. 103. I am asking about the telegram?

A. I am going to tell you about the telegram right now, I don't know whether anybody had told him about myself and Roseman's transaction or not, but anyway, when he came in during the time he was there, the subject arose; I don't know whether I mentioned it to him, and I told him what I had done, and was thinking very strong about countermanding the order, and when I told him that, he said, if you want to countermand it, I will write the countermand and I will send it.

Q. 104. And he did write it and you signed it?

A. Yes, sir.

Q. 105. And he brought it all the way to Gallatin to send it?

A. I don't know where he brought it.

Q. 106. He took it away?

A. He put it in his pocket.

Q. 107. Did you receive that oil?

A. No, sir.

Q. 108. Were you afterward notified that oil was down in the depot here for you?

A. About four week- after that.

Q. 109. You were notified that the oil was in the Gallatin depot for you?

A. Yes, sir.

Q. 110. And you refused to take it?

A. Yes, sir; the reason—I weighed the thing; I don't know whether it was Roseman or not, but, anyway, it was a man representing that company came to deliver the oil, and he called me up and told me that the oil was here for me, and I says, didn't you get my countermand? and he hemmed and hawed a little, and said, well, yes, we got it, but we done had the car sold, or two cars, whatever amount it was, and we just shipped it on anyway and want you to take it any way.

Q. 111. Who was that?

A. That was a representative of the Evansville Oil Company. I don't know what his name was.

Q. 112. It was a telephone conversation you had with somebody?

A. Yes, sir; and he says, you will have to take it, or something like that; it is here for you, and you will have to take it; and I said, you have done agreed you received that countermand in good time, and I said I had a perfect right to do it, and I said, I will be here at my place of business if you want to come up here to see me.

Q. 113. You didn't take the oil?

A. No, sir.

Q. 114. And you did get the fifty gallons from the Standard Oil Company?

A. Yes, sir; I certainly did.

Q. 115. Who delivered it?

A. I could not swear; I think this negro, John.

98 Q. 116. Came in a Standard Oil Wagon?

A. I suppose so.

Q. 117. Has any effort been made to collect the price of that fifty gallons of oil off of you by the Standard Oil Company?

A. Not that I know of.

Q. 118. You have never paid for it?

A. No, sir.

Q. 119. What business are you in now?

A. Mercantile business.

Q. 120. The same place?

A. No, sir; down at Shackle Island, Sumner County, Tennessee.

Q. 121. Still buying from the Standard Oil Company?

A. Yes, sir.

Q. 122. The Evansville Oil Company has not had a man in here since then?

A. I don't know.

Q. 123. You have not seen him here?

A. No, sir.

Q. 124. Have you found any other competitor in here?

A. Yes, sir; a man by the name of McCandless.

Q. 125. Who did he represent?

A. I don't know; some Louisville house.

Q. 126. How do you know he represented a competitor of the Standard Oil Company?

A. I suppose he did; that is what he said; I have the man's word for it.

Q. 127. You don't know of your own knowledge?

A. I didn't jerk him up and have him sworn; I took his word for it.

Q. 128. Do you know of anybody selling any oil here except the Standard Oil Company since Roseman sold that oil here?

A. No, I don't know; it was not any of my business.

Q. 129. Has anybody suggested to you that you might have been liable for your transaction with Holt, for this transaction with Holt?

A. Not that I remember of; I don't see why they should.

Redirect examination.

By Mr. VERTREES, for Defendant:

Q. 130. Mr. Hunter, is or not this true, that the Standard Oil Company delivers oil in tank wagons at great distances from central stations?

A. Well, now, they deliver it as far as ten miles; that is all I know about it.

99 Q. 131. Deliver it in tank wagons?

A. Yes, sir.

Q. 132. Is it not true that the oil is delivered to the door of the merchant and measured out to him there from those tank wagons?

A. Yes, sir.

Q. 133. What are the advantages of that system over the barrel system of shipping it and getting it at the depot?

A. One is the advantage in the leakage and another one is the freight or haulage, any way you might get it, those are two I look on as being advantages.

Q. 134. They are advantages, are they?

A. Yes, sir; that is the way I look at it.

Q. 135. I mean, advantages to the merchant?

A. Yes, sir; I consider it so; if I didn't, I would buy it by the barrel.

Q. 136. You have been asked as to competitors; has any merchant or competitor, except the Standard Oil Company, to your knowledge, offered to deliver oil to you or any other merchant, by tank wagons, at their place of business?

A. Not that I know of; not to me. I don't know what they have done to other people.

Q. 137. Now, you have said there were complaints against the oil you were selling, by some of your customers, at the time Mr. Roseman came to you?

A. Yes, sir.

Q. 138. I will ask you if it is not true that the oil all those customers have been using for years was not the oil of the Standard Oil Company?

A. So far as I know, the majority of it or nearly all of it was, and I don't know positively anybody else's oil that had been in there at all.

Q. 139. And were not these complaints for the time, that is, I mean, recent, about a bad lot of oil that had gotten in here?

A. I don't remember just how long that complaint had been on,

but it wasn't always; it had not always been like it was at that time, the Standard Oil wasn't.

Recross-examination.

By Mr. CATES, Attorney-General:

Q. 140. Mr. Hunter, you took some kind of a written statement from Roseman when you bought the six barrels of oil through him, from the Evansville Oil Company, didn't you?

A. I guess he gave me a duplicate.

Q. —. Have you it with you?

A. No, sir.

Q. 142. Now, you have been telling counsel about leakage out of barrels; didn't Roseman guarantee you against leakage from these barrels of the Evansville Oil Company?

A. I don't remember whether he did or not; I think that is the general rule of the oil company.

Q. 143. Your recollection is that he did?

A. I think that is the general rule; I think he stated that was the rule of his company; I would not say whether he put it on that duplicate or not; if he didn't, it was no good, of course—the agreement, I mean.

Q. 144. Now, isn't it a fact that sometime after the oil had — countermanded, after Holt had been to see you and gave you the fifty gallons of oil, and the Evansville Oil Company's oil had come to the depot, and you had refused to receive it, and it had been disposed of in some way, that about the first of November or sometime in November or December, the Standard Oil Company put the price of its oil up a little?

A. Well, now, I don't remember about that.

Q. 145. Well, Mr. Hunter, what is your best recollection about it?

A. I would not say, for I don't remember anything distinctly about it.

Q. 146. You don't remember about that?

A. No, sir.

By agreement of counsel, signature of this witness to his deposition waived, the stenographer to sign the name of the witness in his stead.

L. C. HUNTER,
By BUFORD DUKE, *Stenographer*.

Witness claims attendance one day and mileage, he living ten miles from the courthouse at Gallatin, Tennessee.

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Filed June 18, 1907. J. D. G. Morton, C. & M. (Trans., Vol. I, p. 267.)

HARRIS BROWN, called on behalf of defendant, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. 1. This is Mr. Harris Brown?

A. Yes, sir.

101 Q. 2. Where do you live?

A. Near Gallatin, Sumner County, Tennessee.

Q. 3. What position do you hold?

A. County Court Clerk.

Q. —. How long have you been County Court Clerk?

A. Since September, 1886.

Q. 5. As such Clerk it is your duty to collect privilege taxes, as well as some other taxes?

A. Yes, sir.

Q. 6. Do you remember an occasion upon which a company known as the Evansville Oil Company shipped some oil to Gallatin?

A. Yes, sir.

Q. 7. In which a question arose as to whether it should pay a tax or not?

A. Yes, sir.

Q. 8. When was that, Mr. Brown?

A. In 1903, Mr. Vertrees.

Q. —. About what time?

A. Well, it was along in the fall, is my recollection; the fall of 1903.

Q. 10. How long has the Standard Oil Company been doing business at Gallatin?

A. Ever since I have been Clerk.

Q. 11. And as Clerk it has been your duty to collect privilege taxes of it?

A. I cannot say that the law has always demanded a privilege tax of them.

Q. 12. But it has most of the time?

A. Yes, sir.

Q. 13. And you have collected that tax?

A. Yes, sir.

Q. 14. Have those taxes always been promptly paid?

A. Yes, sir.

Q. 15. Was there some oil shipped into Gallatin from Evansville at the time you have mentioned, in 1903.

A. Yes, sir.

Q. 16. Who was the representative of the Evansville Oil Company in charge of it?

A. I don't believe I can remember the names; there were two parties in it.

Q. 17. I will suggest the names to you, was one of them Mr. Roseman and the other one Mr. Honeywell?

A. Those names sound familiar; I think the men were named Roseman and Honeywell.

102 Q. 18. Did you approach the representative of that company, whoever he may have been, whether it was one of these gentlemen or not, upon the subject of his paying a privilege-tax for shipping in that oil and assuming to sell it here in Gallatin.

A. I did, sir.

Q. 19. What statement did he make to you as to it?

A. Why, it has been so long ago I could not give you all that transpired between myself and Mr. Honeywell. My recollection is that the first representative that was here was named Roseman, and it was with him that I had a conversation about the license.

Q. 20. What representation did he make to you as to the transaction and as to the shipment?

A. Well, he didn't manifest any desire to avoid paying the license, provided he owed it; he didn't seem to be familiar with our law, but when I explained to him that the license attached if he sold oil from a car or tank here at the depot is attached, but there was no license for his taking orders and shipping here on the orders to whom he sold it to, and he finally agreed, that being the case, if he owed any license, why he would come up and pay his license.

Q. 21. Isn't this what happened, Mr. Brown, that you saw Mr. Roseman, the representative of the Evansville Oil Company, and told him that you were informed that he had shipped in some oil to sell here at Gallatin, to the merchants, and your information was of the character that he should pay a privilege tax for doing it, and that you and he had some conversation, in which you explained the law to him to this effect, that if he shipped that oil in here to sell it here, he would have to pay a tax, but if he, as a traveling salesman, had taken orders for that oil to be shipped from another State into Tennessee, that on those orders he would not have to pay a tax, and then didn't he say, that being true, he was not liable, and that every barrel of it had been sold on an order, before it was shipped?

A. Mr. Vertrees, my recollection is that I received a letter from the Comptroller at Nashville advising me of the fact that there was an oil company selling, or would attempt to sell, some oil at this place, and for me to be on the lookout. I knew of the fact that this man was here at the time, and was watching the point, and I went down to the hotel known as the Jones Hotel to see this agent, and he was out, and that night when he came in—he had gone up the country—and that night he called me up by telephone and said he understood I had been down there looking for him, and I told him yes, and we had quite a conversation over the telephone, and after fully explaining to him, as you have suggested, that was the result of our conversation, that so far he was only taking orders,
and would have none in his car except what he had orders for,
103 but if he did have, he would pay the license on it. That was the general result of the conversation.

Q. 22. Were not indictments found against the Standard Oil Com-

pany in the Circuit Court of Sumner County, Tennessee, on account of the charge that the agents of the Standard Oil Company had caused certain merchants to countermand orders they had given to this man?

A. Yes, sir.

Q. 22½. And wasn't a trial had of the defendants under one of those indictments, the one in the S. W. Love case?

A. I understand so.

Q. 23. And didn't you testify as a witness in that case?

A. I did.

Q. 24. For the State?

A. I don't remember who had me summoned.

Q. 25. But you did testify?

A. Yes, sir.

Q. 26. Wasn't that in September, 1904?

A. I believe that is about the time; yes, sir.

Q. 27. Now, I will ask you if, under cross-examination, you were not examined and answered as follows, being examined by Mr. Blackmore for the defendants:

"Q. This Evansville Oil Company hadn't taken out a license in Sumner County prior to this date for the selling of oil here?

"A. No, sir.

"Q. And did this agent or person with whom you were speaking, tell you that they had some barrels of oil there that had not been sold to anybody?

"A. No, sir, he did not; he told me every barrel he had that they had taken orders for it; and they had cancelled the orders and left the oil on their hands.

"Q. And then he did not tell you of any excess number of barrels that had not been sold, at the same time?

"A. No, sir. My recollection is that he told me that he did not have a barrel that had not been ordered. I inquired particularly to see if I could catch him with a license on that.

"Q. Now, he told you it came directly from Evansville?

"A. He said there was where they sent the orders, direct to Evansville or their warehouse; he said their headquarters was Evansville, and I understood it was Evansville."

Now, Mr. Brown, I ask you if you were not examined as a witness, and testified as a witness in that case, on that trial, in that way?

A. I was, and properly connected, those statements are exactly true, but I had more than one conversation with this man, and I don't know what conversation you have reference to.

104 Q. 28. The particular point I wanted to know—

A. The answer there was a conversation I had with this man along about the close of this whole transaction. When I was talking awhile ago, about the time I first approached him.

Q. 29. So, this was after the oil came in?

A. Yes, sir.

Q. 30. Now, then, speaking with reference to that—

A. Wait a minute; not after the oil came in. Before this oil

reached here, Mr. Vertrees, Mr. Holt, of the Standard Oil Company, came to my office to inform me that a lot of oil would be coming, and to be on the lookout, and wanted to know if I had made them pay a license, and I said, they have not paid a license, but they have agreed if they owe any license they will pay it, and that evening, or the next day, or very shortly after having this conversation with Mr. Holt, I had this letter from the Comptroller.

Q. 31. Now, didn't you say this in your deposition, at the time and place stated, after relating the first conversation:

"Q. Did he pay you a license under that statute?"

"A. In a day or two thereafter he was here again, and he and I had a talk about it. It is my recollection he told me this oil was shipped in good faith from Evansville, to parties he had taken orders from, and shipped direct to them; but some way or other, they had cancelled his orders, and now his oil was in the depot, and did not know what to do with it; but before he did anything he would communicate with his house from Evansville, and if they sold the oil from there, he knew they would pay the license. He had to leave, and left the oil in charge of Mr. Ellis. I saw him and told him, if the parties should order the oil, if the parties who ordered the oil refused to take it, and if they re-sold the oil, they owed a license; but he promised me that he, individually, would notify me before any of the oil was delivered, if they sold that way, and I said if he would do that, I wouldn't issue a distress warrant. He said that would be all right, and he notified the house in Evansville, and they sold the oil and paid the license."

A. You see there comes in the second man. You got me there as saying in the depot, I think at that time the oil was at the depot in a car, afterwards it was unloaded and put in the depot.

Q. 32. The particular point I wanted to get your mind on was, at the time of this conversation, the oil was here at Gallatin, had arrived?

A. Yes, sir.

Q. 33. Was in the car or in the depot; but it was here?

A. Yes, sir.

Q. 34. And it was then that he represented to you that every barrel of it had been ordered and sold on orders, and his
105 trouble, and his only trouble, was, some of the orders had been countermanded; isn't that true?

A. That is my recollection; yes, sir.

Q. 35. And didn't you say, with reference to that, and isn't this true:

"A. No, sir; my recollection is that he told me that he did not have a barrel that had not been ordered; I inquired particularly to see if I could catch him with a license on that?"

A. Yes, sir.

Q. 36. And that is a fact?

A. Yes, sir.

Q. 37. But there were orders that had been countermanded, and so, yielding the point on that, he paid the license without more ado,

and did you go into the question of whether that oil had all been shipped on orders or not?

A. I didn't care whether it had all been shipped on orders. If he had any to be sold from that car, one barrel would have made him liable for license. But I issued the distress warrant because this man who told me that he would see the license was paid provided he sold any from the car went away without seeing me the second time, and the next thing I heard of it Mr. Ellis told me he had left it in his charge, and he would pay the license; and I concluded the safest way was to issue a distress warrant, and when it was sold I knew I would get my license; thereupon I did that, and thereupon, in a day or two, Mr. Honeywell came down and said he was sorry such a thing had been done, and I said, "Your other man didn't come back and see me after he had his talk with me and satisfy me that he would pay the license, and I then attached this oil," and Mr. Honeywell paid the license and the costs.

Q. 38. Was any record furnished to you of the number of barrels that had been ordered and who ordered them?

A. No, sir; I only got that from rumor.

Q. 39. He only made a general statement?

A. He just paid the license. I don't know how many barrels he had down there.

Q. 40. Then you don't know, as I understand you, just how many barrels were shipped in?

A. No, sir.

Q. 41. And whether on orders or not?

A. No, sir; I don't know. I know the fact from their statements to me, the orders were countermanded, and they had a lot of oil down there, and the man figured in my office, figured on the expense of shipping that oil from here to Frankfort, Kentucky, and shipping it back; taking orders again and shipping it back; and
103 compared that with what the license would cost; and he just said, "Oh, well, I will pay the license."

Q. 42. Do you know what became of that oil?

A. No, sir.

Cross-examination.

By Mr. GUILD, for Complainant:

Q. 43. What was your first information that the Evansville Oil Company had sold any oil in this territory?

A. I can't remember just now how I heard there was a representative of the Evansville Oil Company in town soliciting orders, but I heard that he was here soliciting orders before I even heard that he had sold any, and I was watching out from that time; but I had had a conversation with this man over the telephone from my residence one night, and I told him to call at my office the next morning, which he did, and we talked it over, and he said if I violate the law or am liable for a license, we will pay it, but we will wait and see; and I said, "I don't want you to pay a license without you owe it." That evening, or the next day, Holt came in to tell me the Evansville man was here taking orders for oil; that they paid their license, and

we ought to see that they paid us; and I told him I would try to attend to that; and possibly in the next mail or two after I saw Holt (he was right from Nashville, it seems) I got a letter from the Comptroller, telling me there was information brought to his office saying that the Evansville Oil Company was trying to sell oil at Gallatin, and to be on the lookout. I went to Nashville in a day or two afterwards, and went up to the Capitol, and went and asked where he got his information, and he told me, privately, however, and I told him I was looking after that and was satisfied they would pay the license if they violated the law or became liable for a license; and then it began to be rumored around town that a lot of fellows that had ordered oil had canceled the orders.

Q. 44. When was it that Mr. Holt came to see you about the matter, with respect to the time Mr. Roseman took the orders?

A. Well, it was shortly after I heard Roseman was taking the orders that he came in to see me.

Q. 45. Was that while Roseman was still in Gallatin?

A. I think Roseman was in Bethpage the day Holt came in my office.

Q. 46. Is that Mr. Holt the same C. E. Holt who was indicted along with the Standard Oil Company in these cases?

A. Why, I don't know the gentleman's given name, a little fellow; I saw him on trial here; he is the same Holt I had the conversation with.

107 Q. 47. Have you the letter you received from the Comptroller concerning this matter?

A. No, sir; I filed that letter, I think, with my deposition or in this record; that is the last I heard of it.

Q. 48. If that letter can be found or a copy, will you file it as an exhibit to your deposition?

A. Yes. I have got no copy, though; it was lost in the Circuit Court.

Q. 49. You state it is lost?

A. I say it was lost; I was told before it was lost, out of the record in the Circuit Court.

Q. 50. Did or not that letter from the Comptroller, concerning this matter, state that the information came from one Mr. Comer, or the Standard Oil Company representative?

A. The letter did not, Mr. Guild, but the Comptroller told me there was where he got the information in the personal talk between us, after I went to Nashville.

Q. 51. That the Standard Oil Company, through its agent at Nashville, had instructed him to require the Evansville Oil Company to pay a license?

A. As I said a while ago, I was in Nashville a day or two after I got this letter and was in the Comptroller's office and asked him, as a matter of curiosity, who informed him this was the case, and he said the information came from the Standard Oil Company's Agent at Nashville, and I remarked I had been looking after it and watching it all the time.

Q. 52. Was that agent at Nashville through whom such information came named J. E. Comer?

A. I understand his name was Comer.

Q. 53. What was the date of that letter to you with respect to the date that Mr. Roseman was taking these orders around Gallatin and Sumner County?

A. Well, it was a few days after Roseman came here, and while he was here in Gallatin and in the vicinity of Gallatin. He was out at Bethpage the day Holt came in my office; I think he took some orders at Bethpage that day, Hunter & Co., I think.

Q. 54. Was, or not, this man Holt exceedingly insistent and meddlesome in the matter, with you?

A. So much so he and I had a few words there in the office.

Q. 55. Was it any of his business about the conducting of your business or office?

A. Well, there is a great deal in a man's manner; he seemed to lay great stress, when in the office, that he was paying a license in Tennessee and anybody else had to pay a license, and I informed him I would try to look after my office and make him and everybody else that did not, that owed one, pay it.

108 Q. 56. Did you, or not, tell Mr. Holt that the Evansville Oil Company was not going to sell any oil here except what they had sold upon order, or that was their claim?

A. I satisfied him in the course of the conversation, that the Evansville Oil Company had assured me, if they sold in violation of law, they would pay the license, and I was satisfied they would do it.

Q. 57. Was anything said between you and Mr. Holt about Roseman having taken some orders around Gallatin?

A. Yes, sir; I think he called my attention to the fact that he had taken orders around Gallatin, and his idea was he was liable, and I told him, no, not unless he sold some out of his car, after he got here with it, that he would not be liable for orders taken and shipped that way.

Q. 58. He then claimed to know of the sales that had been made by Roseman, and was acquainted with the business carried on by the Evansville Oil Company?

A. I cannot remember that long just exactly what language either one of us used at the time, but the idea conveyed to my mind from that conversation was, coupled with what I learned afterwards, that Holt created the impression on my mind that he knew orders had been cancelled at the time he was in my office.

Q. 59. That he knew all about that?

A. He seemed to be very positive of the fact that the car was coming, and there was oil in there——

Q. 60. That would have to be resold?

A. That would have to be sold from that car; that was the point impressed on me.

Q. 61. In other words, it was unsold, and would have to be sold out of it?

A. That was unsold and to be on the lookout for that car. That was what sort of touched me; I thought these men were gentlemen,

and promptly told him I thought if they did so they would promptly pay their license.

Q. 62. Did you know, or had you been informed at the time, that he had secured countermands for these various orders?

A. I didn't know at that time; no, sir.

Q. 63. What kind of license did the Standard Oil Company pay at that time and prior thereto?

A. They always paid the license required of them by law in towns of the population of this size.

Q. 64. As a dealer or merchant, or how was that?

A. The laws varied along there so—I think they were paying in 1903, though, a license—dealers in coal oil prior to that there was a merchant's license, and there was then a merchant's license and privilege on top of that, extra.

109 Q. 65. As a matter of fact, were they at that time and for some time prior thereto, conducting a wholesale and retail business in coal oil from their tanks and depot over here by the L. & N. R. R.?

A. My recollection is, Mr. Guild, the law at that time, back there, required them to pay a regular merchant's license, and that they for some time paid a regular merchant's license and also a tax upon a little lot, where they have a coal oil tank located, paid that to the Trustee; they have always paid whatever license the law required of them.

Q. 66. That is not my question, but the character of the business, wholesale or retail, that they were doing from this point?

A. I never looked into the point whether they were doing a wholesale or retail, for the tax was the same whether it was retail or wholesale; consequently I never asked the question whether they were wholesaling or retailing.

Q. 67. I refer to their mode of business, and do you know of your own knowledge whether they delivered oil in Sumner County and surrounding territory from the tank or depot here?

A. Oh, yes; they deliver from the tank at the depot, the Standard Oil Company did.

Q. 68. Do you know the capacity of that tank or depot?

A. No, sir.

Q. 69. How do they deliver it to the country?

A. They deliver it in wagons, regular oil wagons.

Q. 70. Labeled Standard Oil Company?

A. Yes, sir. The tank is on wheels, with mules or horses to pull it from one place to another.

Q. 71. Do you know how much they usually keep on hand over there?

A. I do not.

Q. 72. Does not your privilege tax show that?

A. No, sir.

Q. 73. They don't pay an ad valorem tax?

A. Only on valuation.

Q. 73. I mean average valuation of stock?

A. No, sir; the license for a number of years has been just so many dollars.

Q. 75. Privileges as a dealer?

A. Yes, sir. My recollection is, they pay on from a thousand dollars—five hundred to a thousand dollars of oil, when they paid taxes as merchants, but since the merchant's license has been done away with, it is so many dollars, regardless of what they have.

Q. 76. The thousand dollars' value was based on the average quantity and value?

A. Yes, sir; that is right; like any other merchant.

110 Redirect examination.

By Mr. VERTREES, for defendant:

Q. 77. That would not indicate how much at any given time they had on hand?

A. Only an average.

Q. 78. Just an average for the year?

A. Yes, sir.

Q. 79. Now, isn't it true that in point of fact, that car load of oil that was shipped in here by the Evansville Oil Company contained seventy-two barrels, and only sixty-two barrels of which had been ordered, and ten of which they did not have orders for at any time?

A. Mr. Vertrees, I never knew exactly how many barrels there were in the car; I wasn't concerned about the number of barrels they had—if they had two, or ten, the license would have been the same.

Q. 80. But were not Roseman and Honeywell both examined in the case you have referred to, and didn't they state such to be the fact, that there were ten barrels of the seventy-two barrels that had not been ordered by anybody, and were not they agents of the Evansville Oil Company when they made it?

A. I never heard their statement and never have read it over.

Q. 81. You have been asked about Holt, about his being offensive and meddlesome in the matter of this tax. Isn't it true that the Standard Oil Company has always promptly paid its taxes?

A. I so stated; yes, sir.

Q. 82. And is it considered offensive for its agent or anybody to come and insist other people, or competitors, shall pay their taxes also?

A. Well, the manner in which a man expresses a thing has a great deal to do with the offensiveness.

Q. 83. Of course, a man could be very offensive in his manner?

A. That is right.

Q. 84. But is it considered an offense to a tax collecting officer for anybody to report it to him and point it out?

A. No, sir; but that is a right; but a man if he comes at a fellow kind of insinuating you make me pay, but don't pay any attention to the other fellow.

Q. 85. That you don't like?

A. No, sir.

Q. 86. Because you didn't try to do that?

A. No, sir; and I was fully determined the Evansville people would pay the license.

111 Q. 87. To refresh your recollections, didn't Mr. Holt tell you that part of this car load there were no orders for at all, and that their representatives in their representations to you that they had orders for every barrel of it, that was false and untrue?

A. You see, the car load of oil wasn't at the depot at the time Holt and I had this conversation, and it was a little peculiar to me that Holt was so thoroughly posted about that car load of oil, and we had a little rough words about it.

Q. 88. But the fact that he was posted was not offensive?

A. He conveyed to my mind that he knew there was oil in that car when it came here that had not been sold, and he wanted me to just grab it when it got here.

Q. 89. Now, in point of fact, I ask you if it is not true that there were ten of the seventy-two barrels of oil that had not been sold to anybody?

A. I don't know; I didn't hear the testimony in the case, and never read it, and don't know what the proof was.

Q. 90. But you do know the net result of it was, you made them pay the taxes?

A. Yes, sir.

Recross-examination.

By Mr. GUILD, for Complainant:

Q. 91. As a matter of fact, Mr. Holt was making this question before any liability could attach to the Evansville Oil Company?

A. That was the point; the oil was not here, and the matter had not developed as to whether they were going to be liable or not.

Q. 92. That was the first oil the Evansville Oil Company had brought in here, was it?

A. The first I knew of it.

Q. 93. Have they been in here since that with any oil?

A. I don't know whether they have or not; I don't think they have.

Q. 94. Have you heard of any other oil company doing business here since then?

A. There has been nobody here selling oil since then but the Standard Oil Company, to my knowledge.

Q. 95. Nobody else has taken out a privilege license before you?

A. No, sir.

Q. 96. How was it before this?

A. Well, now and then, let me see, there was another company used to try to sell oil here; I don't think there was more than once or twice to my knowledge before, that anybody attempted to sell oil here before that but the Standard Oil Company.

112 Q. 97. They had a monopoly of the business then and have now?

A. With one or two exceptions, and have had entirely so since.

Redirect examination.

By Mr. VERTREES, for Defendant:

Q. 98. Did I understand you to say, Mr. Holt was under the impression that after selling on orders merely, without more, the Evansville Oil Company would be liable for a tax?

A. I don't know what impression he was under, but he conveyed to my mind when we first commenced talking, that they would owe a license, let them sell whatever they might, and I called attention to the fact that if they lived out of the State and took orders and shipped to these parties, we could not do anything with them.

Q. 99. But the point is, didn't he have the idea if they shipped here at all, orders or no orders, they would have to pay?

A. He conveyed the idea to me they would owe the license, however they sold, and I was trying to explain to him the law.

Recross-examination.

By Mr. GUILD, for Complainant:

Q. 100. And after you told him that he argued that these people would be liable, regardless of what you said?

A. That came up in this way: When I told him I was satisfactorily assured by these Evansville people if they owed the license they would pay it, and when I explained to him that if they took nothing but orders they had no license to pay, then he satisfied me, or assured me, that there would be plenty of oil in that car that would not be sold when it reached the depot.

Q. 101. And would be subject to the license?

A. Yes, sir.

Q. 102. Independent of the interstate order business?

A. Yes, sir. When he seemed to fully understand me they would owe a license only on what they sold after reaching here, he then said there would be plenty of oil in that car that had not been ordered.

Further this deponent saith not.

HARRIS BROWN.

Sworn to when given and subscribed before me on this 24th day of June, 1907.

J. D. G. MORTON,

Clerk and Master Chancery Court.

Witness claims attendance one day.

113 *Agreement. Filed Nov. 14, 1907. J. D. G. Morton, C. & M.*

In the Chancery Court of Sumner County, Tennessee.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY OF KENTUCKY.

In this cause, in order to save the trouble and expense of taking the depositions of Claude Roseman and Thomas M. Honeywell, it is agreed and stipulated

That copies of the testimony of said Roseman and Honeywell, as given in the Circuit Court of Sumner County, Tennessee, on the trial of the case of the State of Tennessee *vs.* Standard Oil Company, of Kentucky, *et al.*, may be read on the trial of this cause, the same as though the depositions of said witnesses had been taken and they testified as formerly, subject, however, to exceptions for competency of testimony.

Copies of said testimony are herewith filed as Exhibit A to this stipulation.

Nashville, Tennessee, November 2, 1907.

Attorney-General for the State.

JOHN J. VERTREES,

Solicitor for Defendant.

Deposition of Claude Roseman. Filed Nov. 14, 1907. J. D. G. Morton, C. & M.

CLAUDE ROSEMAN, called on behalf of the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. PECK, Attorney-General:

Q. 1. What is your name?

A. Claude Evans Roseman.

Q. 2. Where do you live?

A. Evansville, Indiana.

Q. 3. What is your business?

A. Selling oil for the Evansville Oil Company.

Q. 4. How old are you?

A. Thirty years old the twenty-ninth of last January.

114 Q. 5. For whom do you work?

A. For the Evansville Oil Company.

Q. 6. What is that firm engaged in, Mr. Roseman?

A. It is engaged in selling refined and lubricating oils and axle grease.

Q. 7. How long have you been in the employ of that company?

A. It will be four years the 12th day of January, with the exception of three weeks about two years ago this time.

Q. 8. In what capacity did you work for them?

A. Traveling salesman.

Q. 9. What is your territory?

A. Kentucky and Tennessee, along the Ohio River, from Evansville to Cairo, on the Illinois side.

Q. 10. Did you have in your territory the entire State of Tennessee?

A. Yes, sir.

Q. 11. As such traveling salesman, did you, or not, on or about the 13th day of October, 1903, about the month of October, 1903, come to Gallatin for your firm and solicit business for your firm in Sumner County and Gallatin?

A. Yes, sir; on the 5th day of October.

Q. 12. On that trip, did you, or not, call upon one S. W. Love, in the town of Gallatin, and solicit his order for your goods?

A. Yes, sir; I sold him ten barrels of oil.

Q. 13. Have you the original order that Mr. Love gave you?

A. Yes, sir.

Q. 14. You can read it to the jury?

A. It says: "October 5, 1903. Evansville Oil Company. Ship S. W. Love, of Gallatin, Tennessee, by way of Cairo, when, about November 1, 1903, ten barrels of oil, price fourteen and one-half cents; ten empty barrels at one dollar each, ten dollars, f. o. b., Gallatin. Guarantee against leakage, and to be paid for as used. Purchasers' signature, S. W. Love. Salesman, C. E. Roseman."

Q. 15. Whose signatures are those?

A. S. W. Love.

Q. 16. Did S. W. Love sign that contract?

A. Mr. S. W. Love himself signed it.

Q. 17. And are you the Roseman whose name is also signed?

A. Yes, sir.

Q. 18. At the time of this sale, or the taking of this order from Mr. Love, what was the home office of your company?

A. Evansville, Indiana.

Q. 19. From what point was the oil to be shipped to the town of Gallatin?

A. Oil City, Pennsylvania, from the Independent Refining Company, the owners of the Evansville Oil Company.

115 Q. 20. What character and kind of oil was this?

A. It was pure Pennsylvania oil, of high degree gravity.

Q. 21. Coal oil, was it, Mr. Roseman?

A. It was refined oil, illuminating oil.

Q. 22. Now, after this order, what did you do with it after you received it?

A. I gave him a duplicate of it, and I told him the oil would be here on or about November 1, and I went from Mr. Love's store.

Q. 23. What was done with the order after you took it?

A. I put it in my pocketbook.

Q. 24. Well, is that all you did with it, or did you mail it or forward it to your house?

A. No, sir; I kept it until I got through with my trip down here,

and I disposed of a car and took it into Evansville with me myself.

Q. 25. Carried it in yourself?

A. Yes, sir.

Q. 26. You say this was on the fifth day of October you solicited and received this order?

A. Yes, sir.

Q. 27. When did you deliver this order to your home company?

A. Thursday morning.

Q. 28. What day of the month?

A. It was about the eighth of October.

Q. 29. Do you remember what day of the week it was when you were in Gallatin and took that order?

A. I got that order Monday.

Q. 30. And on the following Thursday you delivered it to the home office?

A. Yes, sir; I delivered it about the following Thursday to the home office at Evansville.

Q. 31. I believe you say you took it in person to the home office?

A. Yes, sir.

Q. 32. At the same time did you deliver any other orders?

A. Yes, sir.

Q. 33. What was done with this Love order?

A. It was countermanded on the 14th day of October.

Q. 34. Now, you state it was countermanded; how do you know that?

A. We received a telegram from him.

Q. 35. From whom?

A. It was signed S. W. Love.

Q. 36. Were you at the home office when that telegram was received?

A. No, sir; I was not.

116 Q. 37. Did you see the telegram?

A. Yes, sir; I saw the telegram.

Q. 38. When did you see it?

A. I saw it about the 24th or 25th day of October.

Q. 39. Now, before the receipt of the order countermanding the order, the telegram countermanding the order, what had you done, after your arrival at the home office, with this order?

A. Why, I turned them over to the company to have them shipped down here.

Q. 40. Well, state whether or not they had accepted this order?

A. Yes, sir; they had accepted the order, because he was perfectly good, he was rated from——

Q. 41. State if or not anything was done with reference to the shipment of this oil to Love?

A. Well, he had countermanded it, and the oil was on the way here, and I had to come down here when the car got here, had to come down here to dispose of the oil that was countermanded; we accepted the countermands.

Q. 42. When do I understand you to say the oil had been shipped and was on the way from that point in Pennsylvania to Gallatin when the order countermanding the oil was received?

A. Yes, sir; it was on the way.

Q. 43. You are familiar, more or less, are you, with the corporation known as the Standard Oil Company?

A. Yes, sir.

Q. 44. Tell the jury whether or not that is a corporation in a business competitive with yours?

A. It is in a business competitive with mine.

Q. 45. In the territory of Sumner County, Tennessee?

A. Yes, sir.

Q. 46. Was it, or not, at that time one of your competitors in business here?

A. I did not quite understand that question.

Q. 47. At the time of your coming here and receiving this order, was it, or not, at that time a competitor of yours or the Evansville Oil Company?

A. Mr. Rutherford was the only one here at that time I was here; the next week a Mr. C. E. Holt was here.

By Mr. VERTREES, for Defendants:

State only what you know, and not what you were told.

By Mr. PECK, Attorney-General:

Unless you were here and know it, don't state it.

A. Well, my personal knowledge was that he was here.

117 By Mr. PECK, Attorney-General:

Q. 48. Did you see him here?

A. No, sir; I did not see him here.

Q. 49. You had information?

A. Yes, sir.

Q. 50. We are not asking for that.

A. Yes, sir.

Q. 51. Had you at any time, Mr. Roseman, met the representatives of the Standard Oil Company, when you would be here in your line of business, soliciting orders?

A. I met Mr. Rutherford, over there; he is the only one I met here.

Q. 52. What, if anything, was Rutherford doing?

A. He has charge of the tank station here, and he said to me that they had given Mr. Love a hundred gallons of oil to——

Objected to by defendants, because hearsay and incompetent.

Q. 53. Now, when was this conversation between you and Mr. Rutherford?

A. That was between the—it was on December the ninth.

Q. 54. What year?

A. 1903.

Q. 55. About two months, then, after you were here and had received this order from Mr. Love?

A. Yes, sir.

By Mr. VERTREES, for Defendants:

Now, we ask your Honor to exclude that statement of the witness.

By the COURT:

I think anything Mr. Rutherford said with reference to the transaction would be competent.

By Mr. VERTREES, for Defendants:

After the transaction?

By the COURT:

Yes.

Exception taken by the defendants to the ruling of the Court.

By Mr. PECK, Attorney-General:

Q. 56. Now, Mr. Roseman, make your statement as to what Mr. Rutherford said to you about this order or the countermand of this order by Love which you had taken from him?

A. I met Mr. Rutherford about one hundred and twenty-five feet from the Trousdale Hotel. It was five o'clock in the evening
118 and I had a talk with him there, as I was coming from a house further down the street, and he told me that Mr. Love had received a hundred gallons of oil from the Standard Oil Company to countermand this order.

Q. 57. Did he state to you how he knew that, Mr. Roseman, as to who delivered it?

A. He said that he had delivered it, but that Mr. Holt had contracted with him to this effect?

Q. 58. Contracted with whom?

A. S. W. Love.

Q. 59. Now, state to the jury the effect upon your business, the countermanding of this order.

Objected to by the defendants, because a conclusion of the witness.

Q. 60. Or the tendency of such an act.

Objected to by defendants.

By the COURT:

I think he had better state the facts.

By Mr. PECK, Attorney-General:

Q. 61. Do you know the effect that was produced with reference to the price of oil in Gallatin by reason of these countermands?

A. Yes, sir.

Q. 62. And the sale of oil by you here?

A. Yes, sir.

Q. 63. State it now, if you know, what it was.

A. The price of oil throughout this section advanced three cents, in other places, but not in Gallatin, it advanced one cent.

By Mr. VERTREES, for Defendants:

I hope the witness will be instructed not to volunteer statements.

By Mr. PECK, Attorney-General:

Q. 64. What do you mean by this section?

A. The places where I had been and sold oil; it didn't advance, because I had been there and placed a car of oil and the price stayed just about the same; it shut off competition in giving away this oil.

Q. 65. Were you able to dispose of this oil?

A. Yes, sir.

Q. 66. After it was countermanded? I understood you to say a moment ago it had been shipped before the countermand was received.

A. Yes, sir.

119 Q. 67. Tell the jury what became of it after it arrived here. What you did with it and what finally became of it.

A. There were thirty-one barrels countermanded and we had to place it in storage here; at that time I could not come and Mr. Honeywell came here and put the oil in storage with Mr. Ellis, and left it here until I could come and dispose of it.

By Mr. VERTREES, for Defendants:

Of course, your Honor, all that is incompetent, as he is telling what Mr. Honeywell is doing.

By Mr. PECK, Attorney-General:

Q. 68. We don't desire you to state a thing except that which you know of your own personal knowledge.

A. Well, yes; the oil was shipped from Oil City, arrived here and was placed in storage for the reason that thirty-one barrels were countermanded, and for each barrel—

Q. 69. How many barrels were in the car?

A. Seventy-two barrels of oil and two barrels, or a double drum of gasoline, which counts for two barrels.

Q. 70. Well, now, proceed with your statement.

A. I came here on the 7th day of December, on Monday, the 6th or 7th of December, about 8:30. The next day I got in a buggy and went across the river here, and I placed the balance of the oil with Mr. Powell and Ellis. I went across the river here, and I sold five barrels of oil to Mr. Davis, on the other side of the Cumberland River, and I placed the balance of the oil with Mr. Powell and Ellis, or Ellis & Jones, right across from Mr. S. W. Love; they took sixteen barrels of it, and Mr. Davis took five, and Fitzgerald took the balance, eleven barrels.

Q. 71. Guy Fitzgerald?

A. Yes, sir; ten barrels, it was.

Q. 72. Did Mr. Love take any of that ten barrels ordered by you or by him from you?

A. No, sir; he did not.

Q. 73. When you came here on the 6th or 7th of December, where did you find this oil?

A. It was right across from the freight depot, in charge of Mr. Ellis.

Q. 74. You don't know when it was placed there, did you, of your own personal knowledge?

A. No, sir.

Q. 75. Have you, or not, since that time, visited the merchants of Gallatin and Sumner County for your company?

A. I have visited Mr. Fitzgerald and this company right across from Mr. Love's and I visited Mr. Cron and Mr. W. H. Lane, and Mr. Cron refused to accept his ten barrels he had countermanded.

Q. 76. Don't state about that Mr. Roseman.

A. And Mr. Holder and brother, over here.

Q. 77. Did you visit those gentlemen on the same trip you sold to Mr. Love, is that what you are speaking of?

A. On my return trip, when I sold the other.

Q. 78. When you came in December?

A. Yes, sir.

Cross-examination.

By Mr. VERTREES, for Defendants:

Q. 79. Where do you live?

A. At Evansville, Indiana.

Q. 80. Is the Evansville Oil Company a copartnership or a corporation?

A. Well, I suppose you would call it a partnership, it belongs to four people.

Q. 81. Where do they live?

A. Two, Mr. Merdhans in Pittsburg, Pennsylvania, Bankers, and Mr. Peter Theobald and Mr. Biles, at Oil City, Pennsylvania.

Q. 82. Is it incorporated?

A. It is limited.

Q. 83. Have you one of the cards? Let us see it. This card that you have handed us states that it is the Independent Refining Company, limited, refiners of petroleum and its products, Oil City, Pennsylvania.

A. Yes, sir.

Q. 84. Is that the card you are doing business by?

A. I am doing business for the Evansville Oil Company, a branch of that.

Q. 85. It is a branch of this, is it?

A. Yes, sir.

Q. 86. This is the parent company?

A. Yes, sir.

Q. 87. How many branches are there, do you know?

A. There are three of them I know of; I am not familiar in the East with them; there is one at Titusville and one at Hague, Germany.

Q. 88. Hague, Holland, isn't it?

A. Yes, sir.

Q. 89. So there is one branch in Holland, parent company in

121 Pennsylvania, and it is known as the Independent Refining Company, and the Evansville Oil Company is the branch of that. That is correct, is it?

A. Yes, sir.

Q. 90. Has the Evansville Oil Company a charter? Have you no cards of the Evansville Oil Company?

A. Not with me; no, sir.

Q. 91. Is this the card you carry in making the sales?

A. No, sir; that is just one I picked up last Saturday.

Q. 92. What has your other company's cards on them?

A. Evansville Oil Company, Evansville, Indiana.

Q. 93. Who is the president of the company?

A. The chairman is Mr. Theobald.

Q. 94. Who is the secretary and treasurer of the Evansville Oil Company?

A. Mr. Honeywell is the treasurer.

Q. 95. I see Mr. D. E. Biles is the treasurer of the parent company?

A. Yes, sir.

Q. 96. Is he of the Evansville Company?

A. I don't know. Mr. Honeywell is the treasurer and manager.

Q. 97. Has the Evansville Oil Company filed its charter in the State of Tennessee?

A. Yes, sir.

Q. 98. Do you know that yourself?

A. I don't know it myself.

Q. 99. You do not?

A. No, sir.

Q. 100. Then just answer, please, those things which are within your own knowledge, and not what has been told you. I understood you to say that you had been with the Evansville Oil Company, this branch of the Independent Refining Company about four years, except one slight interval?

A. Yes, sir.

Q. 101. And your territory in which you travel as salesman, is parts of Kentucky, Tennessee and portions of Illinois?

A. Yes, sir.

Q. 102. And your business is that of traveling salesman, to sell oil. Is that right?

A. Yes, sir.

Q. 103. Have you ever sold any oil in Gallatin before this time you speak of?

A. No, sir.

Q. 104. Never had?

A. No, sir.

122 Q. 105. Then you had no customers here previous to your coming here?

A. No, sir.

Q. 106. Your first visit here?

A. Yes, sir.

Q. 107. Don't you know, as a fact, that previous to your com-

pany coming here, Mr. Love had been the regular customer of the Standard Oil Company?

A. I don't know, sir, who he did business with.

Q. 108. You knew he was a dealer in oil and procured it from some one?

A. I didn't know he was in business before I came here.

Q. 109. You knew he hadn't gotten any from you?

A. I knew we had not sold any here.

Q. 110. You knew he was not a customer of yours previous to this?

A. No, sir.

Q. 111. It was about October, 1903, you solicited Mr. Love?

A. Yes, sir.

Q. 112. And you did place an order with him, I understand you, for ten barrels of coal oil?

A. Ten barrels of refined oil, illuminating oil.

Q. 113. Isn't that coal oil?

A. It is refined oil.

Q. 114. Isn't it coal oil?

A. It is refined oil, illuminating oil.

Q. 115. Well, is it coal oil, or not?

A. The correct name is refined oil, or illuminating oil.

Q. 116. Is it, or not, generally speaking, coal oil?

A. It is a product of petroleum.

Q. 117. Is it known to the trade as coal oil.

A. Yes, sir; it is known to the trade as coal oil.

Q. 118. And your concern, located at Evansville, in the State of Indiana, sent you out and took this order here in Tennessee, in Gallatin, Sumner County, Tennessee, for the delivery of the oil of your selling company. Is that right?

A. Please state that again.

Q. 119. The oil was sold by the Evansville Oil Company, through you?

A. I sold it; yes, sir.

Q. 120. To Mr. Love, at Gallatin, Sumner County, Tennessee?

A. Yes, sir.

Q. 121. And where did you say the company had its oil?

A. At Oil City, Pennsylvania—is shipped direct from there here.

123 Q. 122. You shipped direct from there?

A. We shipped this car from there.

Q. 123. Do you know that, or is that your information?

A. I know that.

Q. 124. You saw it shipped?

A. No, sir; I saw the bill of lading.

Q. 125. You saw the bill of lading, and therefore you know it was?

A. Yes, sir.

Q. 126. Now, you say Mr. Love countermanded the order by telegram and your company accepted the telegram. Didn't you make that statement?

A. Well, he countermanded it.

Q. 127. Did you not also say that your company accepted that countermand?

A. Yes, sir; I did.

Q. 128. Now, is it, or not, the customary use of the trade, Mr. Roseman, that although merchants do give orders, if they do see fit and desire to countermand them, that you accept the countermand?

A. Not as a general rule.

Q. 129. I am not on what he had signed or your ability to hold him to it, but I am asking you if that is not the way the business is ordinarily done?

A. He would not have countermanded the order had he not have received the hundred gallons of oil from them to do that.

Q. 130. I am not arguing that point, but the way the oil business is conducted in general. I ask you if a merchant who orders oil, for reasons satisfactory to himself, countermanded the order, if the rule is not to accept the countermand where it is a small quantity?

A. No, sir.

Q. 131. Then this was exceptional in this case?

A. Well, it was a case of have to.

Q. 132. Why did you have to?

A. Well, he had received the one hundred gallons and he would not accept it.

Q. 133. Wait a minute; leave out the one hundred gallons and get back to the telegram. I understood you to say he sent in a telegram countermanding the order?

A. Yes, sir.

Q. 134. And you all accepted it?

A. I didn't accept it.

Q. 135. Didn't you say your company accepted it, more than once. Didn't you make that statement since you have been on the witness stand?

A. Yes, sir; they accepted it.

124 Q. 136. Now, you returned to Evansville from Gallatin about what time on your first visit?

A. I got there at eight o'clock on Thursday morning.

Q. 137. And you say the order countermanding it got in when?

A. On the thirteenth and fourteenth.

Q. 138. Where were you between the 8th and 15th of October?

A. The afternoon of the 8th I went to Sturgis and Morganfield and Uniontown; that is, on Friday, and Saturday I got to Evansville, and the next two weeks I was over along the Ohio River, and to my knowledge I spent Sunday at—

Q. 139. That is not important. But is it not true that from about the 9th or 10th of October, for two or three weeks you were absent from Evansville?

A. Yes, sir.

Q. 140. So, what you have stated about the countermanding the order, and the exact date, is merely from information received since?

A. I saw the telegram on my return from Evansville.

Q. 114. And that was when?

A. On the 24th or 25th of October.

Q. 142. So you know nothing of what had transpired between the 9th and the 24th or 25th of October?

A. No, sir.

Q. 142½. And what you have stated occurred was from information gathered upon your return?

A. Yes, sir.

Q. 143. Now, when did you come back from Gallatin?

A. On December 7th.

Q. 144. So you, of your own knowledge, know nothing of what occurred at Gallatin between October 6th and December 7th?

A. Only by what I heard there at the office.

Q. 145. And all you have related about these other things is what somebody told you?

A. What I found out between December 7th and 10th.

Q. 146. You found out between the 7th and 10th?

A. I found it out myself.

Q. 147. And you came here to Gallatin?

A. Yes, sir.

Q. 148. The oil had then come that I understand you had taken orders for?

A. It was stored here.

Q. 149. Do you know when it came, of your own knowledge?

A. I know about when it got here.

Q. 150. I say, of your own knowledge?

A. It got here about the 4th of November—about the 2d or 4th of November, between the 2d and 5th of November.

125 Q. 151. So the order was taken on the 5th of October?

A. Yes, sir.

Q. 152. But the oil didn't reach Gallatin until when?

A. Between the 2d and 5th of November.

Q. 153. That is, about one month after that time?

A. Yes, sir. It takes three or four weeks to get a car down here, around down here or along there.

Q. 154. You have given us a list of those to whom you sold oil here on the 5th of October, haven't you?

A. Not a full list.

Q. 155. Now, just state how many barrels you sold on that trip.

A. I sold sixty-two barrels.

Q. 156. And you shipped how many?

A. Seventy-two.

Q. 157. Ten more than you had sold?

A. Yes, sir.

Q. 158. Then you came down here, as you say, early in December, and then you proceeded to sell the ten barrels you had not sold?

A. Yes, sir.

Q. 159. As well as the oil that had been countermanded?

A. Yes, sir.

Q. 160. And which Mr. Love had declined to take?

A. Yes, sir.

Q. 161. And you say there were ten barrels of that?

A. Yes, sir.

Q. 162. What did you get for the oil you sold when you came in?

A. Fourteen and a half cents.

Q. 163. What was the price that you had bargained to sell it when you came here first?

A. Fourteen and a half cents.

Q. 164. So, when you came in December to sell it, you got the same price you had bargained to sell it for?

A. Yes, sir; I called on new people.

Q. 165. You called on new people and sold it to new people?

A. Yes, sir.

Q. 166. And there were ten barrels you had not sold?

A. Well, I don't know exactly how many there were.

Q. 167. But the essential point I want to get at is that the oil you got came here and you sold it?

A. Yes, sir.

Q. 168. And at the same price you had contracted to sell it before?

A. Yes, sir.

126 Q. 169. But ten barrels was some you had not sold at all to anybody?

A. Yes, sir.

Q. 170. Now, isn't it true that the price of oil remained substantially the same here at Gallatin during that time—from the time you first came, the first of October, on down through December, when you made the sales?

A. The next week it advanced one cent.

Q. 171. Where?

A. In Gallatin, here.

Q. 172. Didn't you say a while ago it hadn't advanced?

A. From thirteen and a half cents it went up to fourteen and a half cents, and other places in this territory it went up three cents.

Q. 173. Then, as I understand, it was thirteen and a half cents when you made your sale at fourteen and a half cents?

A. Yes, sir.

Q. 174. And then, before you left, it went up a cent?

A. People that didn't buy it from me. The only way I know is from Mr. Franklin. He——

Q. 175. Didn't you make the statement on your original examination that the price of oil had not increased at Gallatin?

A. Well, I don't know. I didn't say. I didn't see any of the receipts.

Q. 176. I am asking you what you stated to the Attorney-General in your original examination?

A. I said it hadn't advanced here as much as at other places.

Q. 177. Did you, or not, say it had not advanced at all at Gallatin?

A. I said it had not advanced as much as at other places.

Q. 178. So that, in point of fact, the advance at Gallatin was less than elsewhere, at that season?

A. Yes, sir.

Q. 179. And by elsewhere, you mean what territory?

A. Throughout the State.

Q. 180. I will ask you now, the conversation with Mr. Rutherford—please repeat what Mr. Rutherford said to you.

A. I met Mr. Rutherford—

Q. 181. Never mind where you met him, and when, and all of that; state what he said.

A. On December 9th, about 5 o'clock, about a hundred and twenty-five or a hundred and fifty feet on the far side—that is, on that side—I don't know what direction that is—beyond the Trousdale Hotel, I met him and told him—he told me he had delivered Mr. Love a hundred gallons of oil that Mr. Holt had contracted to

give him to countermand my orders. That he had given Mr.

127 Lane one hundred and fifty gallons, had given Mr. J. E.

Cron one hundred gallons, and had given Mr. L. C. Hunter, I think it is, at Bethpage, fifty gallons, that is, that Mr. Holt had contracted for.

Q. 182. Now, as I understand you, the conversation was this: That Mr. Rutherford stated that he had delivered this oil to these people, because Mr. Holt had contracted to deliver it to them if they would countermand these orders?

A. Yes, sir.

Q. 183. And it was that he, Rutherford had delivered it?

A. Yes, sir.

Q. 184. Because Mr. Holt had contracted to do it?

A. Yes, sir.

Q. 185. That was the statement, was it?

A. Yes, sir.

Redirect examination.

By Mr. PECK, Attorney-General:

Q. 186. You said that the price of oil in the town of Gallatin, on the occasion of your visit here the 5th of October, the current price was thirteen and a half cents?

A. Yes, sir.

Q. 187. Now, I will ask you to tell the jury the character of the oil as compared to that which you sold to Love at fourteen and a half cents.

Objected to by defendants, because immaterial and incompetent.

By the COURT:

I think you can show whether it was a better grade of oil or the same grade.

Exception taken by defendants.

By the COURT:

I think you can show the price of that oil or any other inferior oil.

By Mr. VERTREES, for Defendants:

Your Honor states, he may state the grades of different dealers.

He is trying to show how good his was and how bad ours was. That is simply a trick of the trade.

Exception by defendants.

By Mr. PECK, Attorney-General:

Q. 188. Then, I will ask you this question, whether or not the grade of oil you were selling here to Mr. Love at fourteen and a half cents, was it not superior to that being sold on the Gallatin market at thirteen and a half cents?

A. Yes, sir; it was superior in every respect; it was forty-eight gravity, Pennsylvania oil. I took a sample of the oil here to Evansville and tested it, and it was a forty-five gravity oil at sixty Fahrenheit.

Q. 189. What oil was that?

A. The fireproof oil sold here.

Q. 190. The Standard Oil Company?

A. By the Standard Oil Company. They class it as fireproof oil.

Q. 191. Now, the difference in the grades of oil you speak of, forty-five and forty-eight gravity, does, or not, that make the one, forty-eight gravity more valuable than the one forty-five degrees?

A. Yes, sir.

Q. 192. As I understand you, you don't know what was done with this oil at the time it was received at Gallatin. You were not here, were you?

A. No, sir.

Q. 193. Then, did the Evansville Oil Company send any representative here that you know of?

A. Yes, sir.

Q. 194. Who was that?

A. Mr. Honeywell—T. M. Honeywell.

Q. 195. He is here, is he not?

A. Yes, sir.

Q. 196. Now, you have detailed, both in your main and in your cross-examination, the conversation that occurred with Mr. Rutherford. I don't want you to repeat that, but desire to ask you this: When, for the first time, did you learn of this countermand from Mr. Love?

A. You mean myself?

Q. 197. Yes.

A. Well, I was in his store. His son was there and Mr. Love told me—

Q. 198. When did you first learn it?

A. That was on December the 7th.

Q. 199. Now, before that you state—

A. No, it was on Tuesday morning. Monday was, I think—it was on Tuesday morning. It was on December the 8th, Tuesday morning, that I was in the store and he told he that he had—

Q. 200. Now, was that the first knowledge you yourself had with reference to this countermand?

A. From Mr. Love direct; yes, sir.

Q. 201. But before that, had you seen anything?

A. The telegram; that was all.

129 Q. 202. Now, when did you first know or hear that, or learn that Mr. Love had been given the hundred barrels—I mean, a hundred gallons of coal oil?

A. Mr. T. M. Honeywell had been down here and told me to that effect.

Recross-examination.

By Mr. VERTREES, for Defendants:

Q. 203. I understand that you are a competitor in business, and have been for years, of the Standard Oil Company?

A. For very near four years.

Q. —. Your company, a longer time than that, hasn't it?

A. Yes, sir.

Further, this deponent saith not.

Claude Roseman Recalled. Filed Nov. 14, 1907. J. D. G. Morton, C. & M.

STATE'S PROOF IN REBUTTAL.

CLAUDE ROSEMAN, called on behalf of the State in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. PECK, Attorney-General:

Q. 1. Mr. Roseman, on the occasion of your visit back to Gallatin, in December, 1903, did, or did not, O'Donnell Rutherford, the local agent of the Standard Oil Company, tell you on the streets of Gallatin that this shortage in his oil account, or this oil had been given away, was charged to him on the books of the company?

A. Yes, sir.

Q. 2. Did he, or not, at the same time, say that they had written to him a number of times about it?

A. He said he had received four or five letters about it at the same time.

Further this deponent saith not.

130 *Deposition of Thomas M. Honeywell. Filed Nov. 14, 1907. J. G. D. Morton, C. & M.*

WEDNESDAY MORNING, September 21st, 1904.

THOMAS M. HONEYWELL, called on behalf of the State, being first duly sworn, testified as follows:

Direct examination.

By Mr. PECK, Attorney-General:

Q. 1. Where do you live?

A. At present, in Evansville, Indiana.

Q. 2. What is your business?

A. I am treasurer of the Evansville Oil Company, and acting manager.

Q. 3. Treasurer and what?

A. Treasurer and manager of the Evansville Oil Company.

Q. 4. Where does the Evansville Oil Company do business, and what is its home office?

A. We are a sub-station of the Independent Refining Company, of Oil City, Pennsylvania.

Q. 5. Where is the home office of the Evansville Oil Company?

A. Oil City, Pennsylvania.

Q. 6. I don't think you understand me. You say that your company is a branch of the Independent Oil Company?

A. Yes, sir; a sub-station.

Q. 7. Where now is the *situs* of the Evansville Oil Company?

A. Evansville, Indiana.

Q. 8. State whether or not the Evansville Oil Company ever at any time sent a traveling salesman into the territory in which Sumner County, Tennessee, is embraced or included?

A. We did.

Q. 9. When was that?

A. It was about the beginning of October of last year.

Q. 10. October, 1903?

A. Yes, sir.

Q. 11. Who was that representative?

A. Mr. Roseman.

Q. 12. On that trip, did, or not, Mr. Roseman take or receive an order for some oil. I want you to state from your own personal knowledge, and not from any information you have received. But, first, I will ask you in what business the Evansville Oil Company is engaged?

131 A. We are engaged in marketing the product of our Oil City refinery in this territory.

Q. 13. Are they, or not, sellers and shippers of coal oil?

A. Yes, sir.

Q. 14. State whether or not Mr. Roseman, this trip last October, took an order from one S. W. Love for any oil. If so, how much?

A. He did; ten barrels.

Q. 15. At the time of taking this order, where were and what were your duties with the Evansville Oil Company?

A. I was in Evansville and performing my duties as manager.

Q. 16. Did you receive this order which Mr. Roseman had taken from Mr. Love?

A. We did.

Q. 17. I will ask you if, or not, the paper I have just handed you is a duplicate of the order, or is it the original order?

A. It is the original order.

Q. 18. Signed by anyone?

A. Signed by S. W. Love and Mr. Roseman.

Q. 19. Mr. Honeywell, when was that order received, and how, at the Evansville office?

A. It was received the same week it was taken. I don't remember

the exact date. I see it is dated the fifth. I think Mr. Roseman—I think very likely it was received either the sixth or seventh. We received the orders all at one time.

Q. 20. When that order was received, what was done with it?

A. I immediately ordered a car load of oil out of Oil City, consigned to Gallatin.

Q. 21. Subsequent to the receipt of that order, was anything done looking to a countermand of it? If so, what was it?

A. Several days after the car had been ordered out of Oil City, we received a telegram signed by Mr. Love, requesting us to countermand his order.

Q. 22. At the time of the receipt of that countermand order had, or not, the oil been shipped or ordered shipped?

A. It had been ordered out; yes, sir.

Q. 23. I don't ask you from whom, but I will ask you this: had or not, your firm received any countermand orders for other oil that had been sold here at the same time to different parties?

A. Yes, sir. Will you please put that question again?

Q. 24. I asked you whether or not the Evansville Oil Company received countermand orders from other customers who had bought from Mr. Roseman on the same occasion he sold Mr. Love?

A. Yes, sir. We received them subsequently to the receipt of this telegram.

132 Q. 25. Was that oil shipped to Gallatin?

A. It was.

Q. 26. Did it arrive here?

A. It did.

Q. 27. Did you, or any other representative of the Evansville Oil Company, come here to look after it?

A. I came here myself to see about the delivery of the oil to the various parties purchasing it?

Q. 28. What time did you arrive in Gallatin on that mission?

A. It was on the morning of the third of November.

Q. 29. Upon your arrival in Gallatin, what, if anything, did you do toward having Mr. Love accept this oil?

A. I called upon him and told him that our car load of oil had arrived, and made a formal tender of the ten barrels to him.

Q. 30. Did he accept it, or not?

A. He did not.

Q. 31. Did he state why?

A. He said that he had telegraphed to us requesting us to countermand his order.

Q. 32. Did you, or not, at that time show him the telegram?

A. I did.

Q. 33. I will ask you, did he speak anything about how it was done, or tell you who wrote out that telegram?

Q. 34. Who did he say wrote the telegram?

A. He said the Standard Oil salesman wrote the telegram.

Q. 35. Did he tell you his name?

A. No; he did not.

Q. 36. What did he do with the oil, or what did you do with the oil after you got here and these parties declined to accept it?

A. We were obliged to store it in warehouse near depot for the time, and later we were obliged to come back here and dispose of it.

Q. 37. As a result of that storing and disposing of it, were you, or not, forced to procure a license, etc.?

A. We were.

Q. 38. Now, tell the jury about it—what license you paid.

A. We had to take out a State and county and city license, amounting to somewhere in the neighborhood of forty-five (\$45.00) or fifty (\$50.00) dollars. I don't remember the exact amount. I think it was over fifty (\$50) dollars.

Q. 39. Did you, or not, rent a house for storage purposes?

A. We did.

Q. 40. Did that cost you anything?

A. Yes, sir; I believe we paid eighteen (\$18.00) dollars after the delivery of the unsold car.

133 Q. 41. Did you procure anyone to look after the matter for you?

A. Mr. Ellis, who owned the house, did that.

Q. 42. Did that cost you anything?

A. That was included in the charge of eighteen (\$18.00) dollars.

Q. 43. Mr. Honeywell, was there anything else you could have done with this oil at that time, other than putting it in the warehouse?

A. The only alternative was to ship it back to Oil City, Pennsylvania.

Q. 44. What would have been the expense of that plan if you had adopted it?

A. It would have cost almost two (\$2.00) dollars a barrel—one (\$1.92) dollar and ninety-two-cents—and reshipping it to Evansville, and considerably more to Oil City.

Q. 45. And there were how many barrels in the car?

A. There were seventy-two (72) barrels in the car.

Q. 46. Any part of that car unsold?

A. You mean including the rejected oil?

Q. 47. Yes.

A. There were thirty-one (31) barrels which were received by the purchasers.

Q. 48. How long did that oil remain in the warehouse, Mr. Honeywell?

A. I really cannot say. Some of it fully two or three months, I think.

Q. 49. Did you, or anyone else for the Evansville Oil Company, finally dispose of it?

A. Mr. Roseman came back later on and disposed of the balance of it.

Q. 50. You don't know to whom he disposed of it, or anything about that?

A. I don't recollect—yes, he reshipped ten (10) barrels of it to Portland, and I think he sold the balance of it here in the city.

Q. 51. At what price per gallon was this oil sold to Mr. Love?

A. At fourteen and one-half cents, bulk—that is, not including the barrel.

Q. 52. What was the character or grade of the oil you sold to Mr. Love?

A. It was a high grade Pennsylvania oil, and much better quality of oil than that shipped into Middle Tennessee.

Q. 53. How long have you been in the oil business?

A. I have been in the Evansville office ten or twelve years. I have been connected in one or another capacity in the oil industry for twenty-five years.

134 Q. 54. Were you ever in the employ of the Standard Oil Company?

A. Not in the marketing part of the oil.

Q. 55. Are you, or not, familiar with the quality of oil sold by the defendant, Standard Oil Company?

A. I am.

Q. 56. State whether or not the oil you sold to Mr. Love was of a higher or lower grade than sold by the defendant company?

A. It was of much higher.

Q. 57. State, if you know, what was the difference in the market value of the two oils at that time?

A. Forty-eight gravity Pennsylvania oil, at refining centers, in the neighborhood of two and a half cents above the forty-five gravity oil.

Q. 58. Do you, or not, know the location, or sites, of the manufacturing plants or refineries of the Standard Oil Company?

A. Yes, sir.

Q. 59. Where are they located?

A. The source from which their products in this territory is drawn, for the most part, in the Whiting Refinery, a suburb of Chicago. They have a pipe line direct from Whiting to the Ohio and Indiana oil fields.

Q. 60. Do you know whether or not they have a refinery or manufacturing plant in the State of Tennessee?

A. They have not.

Q. 61. You say you have been in the oil business in one capacity or another for the past twenty-five years?

A. Yes, sir.

Q. 62. State to the jury what is the most effectual way and means of lessening or destroying competition in the coal oil business?

Objected to by the defendants.

By the COURT:

You can show anything that the defendant did here in this case. I think if he knows what it resulted in, he can state that.

Exception taken by the defendant to ruling of the Court in admitting this line of testimony.

By the COURT:

If he knows it as a fact.

By Mr. PECK, Attorney-General:

Q. 63. You are the treasurer and manager, I believe you say?

A. Yes, sir.

135 Q. 64. What was the result, in fact, to your company, with reference to this territory, after the countermanding of these orders as you have detailed?

By Mr. VERTREES, for Defendant:

We desire to note an exception to that, as an expression of an opinion with reference to the ultimate issue, which is for the Court to determine.

By the COURT:

I don't think so, if the price of the oil was lowered here, or increased, and he knows it as a fact.

By Mr. PECK, Attorney-General:

Q. 65. Answer the question.

A. The result was, we could not afford to attempt to do any further business here.

By Mr. BLACKMORE, for Defendants:

Do I understand Your Honor permits him to answer as to what the result was?

By the COURT:

I think he can state what effect it had upon his company if he knows it as a fact, and not as an opinion.

Exception taken by defendants.

By Mr. PECK, for the State:

Q. 66. That was what I asked him. Answer the question, Mr. Honeywell.

A. The result was, we could not make any further shipments here, having lost money on our first venture.

Q. 67. State whether or not, as a result of that experience, you abandoned this territory?

A. Yes, sir; we did.

By Mr. VERTREES, for Defendant:

Of course, Your Honor understands our exception as holding to these same questions.

By the COURT:

By Mr. PECK, for the State:

Q. 68. Have you the telegram that was received by the Evansville Oil Company sent by Mr. Love?

A. I think I have.

136 Q. 69. Is, or not, that the telegram or a copy of the telegram received?

A. That is the telegram delivered to us.

Telegram.

Received at 11:31 a. m.

Dated GALLATIN, TENN., *October 12, 1903.*

To Evansville Oil Company, Evansville, Indiana:

Kindly countermand my order for ten barrels oil.

S. W. LOVE.

Q. 70. At the time of this transaction, or in October, 1903, was, or not, the Standard Oil Company a competitor in business of your company?

A. It was.

Q. 71. Doing business in this particular territory?

A. It was.

Q. 72. Do you know who their representatives and agents were in this territory?

A. Yes, sir.

Q. 73. Who were they, Mr. Honeywell?

A. Mr. Holt, I believe, was the traveling salesman, and Mr. Ruth-
erford the local agent.

Cross-examination.

By Mr. VERTREES, for Defendant:

Q. 74. Where is your home?

A. I am living at Evansville at the present time, in Evansville, Indiana.

Q. 75. And you have stated that the Evansville Oil Company is a sub-station of some other concern?

A. Yes, sir.

Q. 76. What is the name of that other concern?

A. The Independent Refining Company of Oil City, Pennsylvania.

Q. 77. Is it a corporation?

A. I am not prepared to say; I have been away from the home office for ten or twelve years.

Q. 78. You have been in its service how many years?

A. Ten or twelve years.

Q. 79. And yet, you are not prepared to say whether it is a corporation or something else?

A. I have never had anything to do in the home office; prior to coming to Evansville to assume the management of this company, I was otherwise employed.

137 Q. 80. You are the manager of the sub-division?

A. Yes, sir; at Evansville.

Q. 81. Called the Evansville Oil Company?

A. Yes, sir.

Q. 82. Is it incorporated?

A. It is incorporated in Indiana.

Q. 83. And you don't know whether the parent company is or not?

A. I am not prepared to say.

Q. 84. How many sub-stations has the parent company? How many sub-stations?

A. Our station is the only one operating—

Q. 85. I didn't ask you anything about operating; I asked you how many it had?

A. Our company, together with the Pure Oil Company, is interested in several stations abroad.

Q. 86. Well, how many?

A. I couldn't tell you.

Q. 87. Don't you know? You mean by abroad, in another continent?

A. Yes, sir; in the Netherlands.

Q. 88. You have several stations over in Europe, you mean, do you?

A. They are not stations strictly of the Independent Refining Company, but that company and other independent refining companies.

Q. 89. Are you all together?

A. The independent refining companies are generally and jointly interested in the United States Pipe Line and also in the Pure Oil Company.

Q. 90. They are called "independent," but are interested and associated together?

A. A few of them, not all of them.

Q. 91. How many?

A. I could not tell you exactly how many.

Q. 92. You don't know that, either?

A. No, sir.

Q. 93. There are a few, though?

A. Yes, sir.

Q. 94. But just how many, you don't know?

A. No, sir.

Q. 95. And while they are associated together, you call them "independent," they are all associated together?

A. In marketing their product; yes, sir.

Q. 96. And yours is a subdivision of that concern?

A. One of the independent.

138 Q. 97. And the Independent Refining Company is in the other thing?

A. Yes, sir.

Q. 98. It is two degrees removed; any of these other people traveling this territory?

A. No, sir.

Q. 99. They keep out of your way, do they? Isn't it a fact that

not one of them comes in your way, and they only, you only, have the Standard Oil Company as a competitor?

A. Principally the Standard Oil Company.

Q. 100. This association doesn't travel anybody else but you or your people?

A. They are only interested in the foreign trade.

Q. 101. At the same time, they are not sufficiently interested to put anybody in here but your people?

A. They are not in here.

Q. 102. Not in this territory at all?

A. No, sir.

Q. 103. And your only competitor is the Standard, in this region?

A. No; we come in contact with other independent companies.

Q. 104. Name one in this territory, in all Middle Tennessee, except your company?

A. None in Middle Tennessee; in Memphis——

Q. 105. I am not asking you about Memphis, but about Middle Tennessee, where you say the trouble is, here at Gallatin?

A. No, sir.

Q. 106. None of them ever been to Gallatin, except you and your people?

A. Yes; I believe a company from Louisville is operating in this trade.

Q. 107. That is one of the independent companies?

A. It is a jobbing company.

Q. 108. And belongs to this association?

A. No, sir.

Q. 109. That is an independent concern?

A. Yes, sir.

Q. 110. I mean in this association, the various companies, they travel no one here?

A. They are not traveling any one in this country that I am aware of.

Q. 111. Your people travel some, don't you; didn't you send Mr. Roseman here?

—.

Q. 112. Did they send Mr. Roseman or anybody else in this territory to your knowledge, any of these independent companies you are associated with?

A. No, sir; they did not.

Q. 113. Now, you are manager, you are assistant manager of the Evansville Oil Company, and you are treasurer?

A. I am treasurer and acting manager.

Q. 114. What is the capital stock of that company?

A. Eight thousand dollars.

Q. 115. What is the capital stock of the one you are a sub-station of?

A. I cannot tell you.

Q. 116. You don't know the capital stock of the parent company?

A. No, sir.

Q. 117. And have been with it how long?

A. About twelve years.

Q. 118. And you have no idea what its capital stock is?

A. I cannot tell you.

Q. 119. When you say you "cannot tell," is it because you are obliged not to tell, or you don't know?

Q. 119½. I have never made it a point to inquire, and have felt no interest.

Q. 120. Do you mean to tell the jury you have no idea?

A. I have no idea of the amount.

Q. 121. You employed for your company associate counsel to assist the State in the prosecution of this case, didn't you?

A. Yes, sir.

Q. 122. Brought the matter to the Attorney-General's attention, didn't your people?

A. No, sir.

Q. 123. Who did?

A. I believe their attention was called to it down here?

Q. 124. That is what I mean—you wrote down here?

A. We didn't interest ourselves in that matter.

Q. 125. You have come, and you came without any subpoena, didn't you?

A. I was subpoenaed.

Q. 126. Where, in Evansville?

A. No; when I was here on one former occasion.

Q. 127. How came you here then—what were you doing here?

A. I was in connection with this affair.

Q. 128. You came here to do this business?

A. Yes, sir.

Q. 129. To prosecute these people—that was what you came for?

A. We submitted whatever were in our possession.

140 Q. 130. And you came to do that thing?

A. I didn't instigate it.

Q. 131. You came to do that thing and to submit evidence—you came for that purpose?

A. Yes; you can put that construction on it.

Q. 132. I don't want to put any construction on it; you merely saw how that matter is; but that is so, isn't it, Mr. Honeywell?

A. Upon request, yes, I might say we did.

Q. 133. And you employed counsel to assist the State?

A. Yes, sir.

Q. 134. Now, did I understand you to tell the Attorney-General that your oil is superior to the oil dealt in by the Standard Oil Company?

A. In this territory; yes, sir.

Q. 135. Better oil?

A. Yes, sir.

Q. 136. You say they sell oil gotten from what you call the Ohio oil region?

A. Yes, sir.

Q. 137. And you get your oil from the Pennsylvania oil region, where your parent company is located?

A. Yes, sir.

Q. 138. And you can say it is better than theirs?

A. Yes, sir; the market value of the crude oil is about fifty per cent. greater.

Q. 139. You said something about the market value of oil, or something, being about three cents?

A. That was refined oil.

Q. 140. So, at the time you speak of, the market value of your oil was about three cents higher?

A. About two and a half cents higher.

Q. 141. I stand corrected; about two and a half cents above that of the oil the Standard Oil Company was selling here?

A. Yes, sir.

Q. 142. Now, did you sell yours here two and a half cents above—didn't you sell it just one cent more than the other?

A. We sold it either at the price at which the Standard did sell, or perhaps it is just a trifle more.

Q. 143. In other words, you sold it at two or two and a half cents less than the market price?

A. No, we didn't sell under the market price; the Standard were getting excessive prices, which enabled us to sell our product here.

Q. 144. I think you said the market price was $2\frac{1}{2}$ cents different?

A. In markets where they are sold together.

141 Q. 145. Now, what was the market price of that oil the Standard Oil Company was selling here, in that region, at this time?

A. The Standard, I believe, at the time we made the shipment to Gallatin, were getting $13\frac{1}{2}$ cents for their fireproof grade of oil.

Q. 146. That was what they were selling it at in this territory?

A. Yes, sir.

Q. 147. And by territory, I mean Middle Tennessee.

A. Yes, sir.

Q. 148. Now, you sold yours at what?

A. At $14\frac{1}{2}$ cents, one cent advance.

Q. 149. So there was no difference then between Gallatin at this time and this territory?

A. No, sir; I believe the same price governed here as at Nashville and the surrounding territory.

Q. 150. Did Mr. Roseman send in Mr. Love's order or bring it in?

A. It came in through the mails, I think.

Q. 151. It came through the mails?

A. I think so; I am not positive.

Q. 152. He didn't bring it, is your recollection?

A. I am not able to say positively.

Q. 153. I speak about your recollection. Do you remember when that arrived?

A. It was the same week the orders were taken.

Q. 154. Now, will you please be so kind as to give me that order. This order is dated October the fifth; now when would you say it was received?

A. I think very likely on the sixth or seventh.

Q. 155. And it says that the shipment was to be made about November the first.

A. Yes, sir; that is, delivery to be made in Gallatin.

Q. 156. Delivery about November the first?

A. Yes, sir.

Q. 157. That was as definite as it was, wasn't it?

A. It is impossible, especially in the winter season, to promise delivery on any given date, especially where shipment is made from such distances; ordinarily our tank cars run through from Oil City to Evansville in six or seven days, but it sometimes happens in the winter season, when the railways have more freight to handle than they can do promptly, that our cars are three or four weeks on the road.

Q. 158. But, ordinarily, how long does it take for a car to go from your Pennsylvania point to Evansville?

A. Six or seven days.

Q. 159. And how long, ordinarily, would it take from Evansville to Gallatin.

A. We would naturally expect it to get here in about two or three weeks.

Q. 160. From Evansville?

A. I mean from Oil City, it would take two or three days from Evansville.

Q. 161. It ought to come from Oil City in ten or twelve days?

A. It would not come through Evansville; no, I don't think it could do that in that way, in ten days.

Q. 162. What did you say?

A. Our tank cars, in the best season, when traffic is light, can get through in six or seven days, but in the wintry season, they will average ten days or two weeks, and at the time when the railroads are blocked, are delayed from four to five weeks.

Q. 163. But ordinarily, or usually, how many days does it take to get them from Pennsylvania, Erie or from the refinery, to Evansville in the summer season?

A. In the summer season, six or seven days, and in November or the wintry months we cannot depend upon it short of two or three weeks, and sometimes four or five weeks, so that this season we could not make the delivery in ten days or even in two weeks.

Q. 164. And how long from Evansville here?

A. And we at no time contemplated shipment from Evansville.

Q. 165. Did you have a lot of this oil in store at Evansville?

A. We did.

Q. 166. How long would it take to deliver, by the route you had in mind, from Evansville to Nashville?

A. We couldn't contemplate delivery that way.

Q. 167. I mean, from Pennsylvania?

A. Then, we thought from two to three weeks.

Q. 168. So, the order came in and you forwarded it?

A. Yes, sir.

Q. 169. How far is Evansville from Erie?

A. From Oil City, about six hundred miles.

Q. 170. How far is it from Oil City to Gallatin?

A. Well, I suppose Gallatin is about the same distance, by way of Cincinnati and Louisville.

Q. 171. Now, isn't it true that that car of oil sent in wasn't all sold at all when it left Oil City; that you didn't have orders for a portion of it?

A. I believe there was ten barrels put in for party who had not quite decided whether he would take it or not.

Q. 172. Who was that party?

A. I am not speaking from my own knowledge and that is information I have received.

143 Q. 173. Isn't it a fact that there were ten barrels of coal oil and a double tank of gasoline you didn't have orders for and put in to fill out the car, expecting to sell it down here?

A. No, sir.

Q. 174. Nothing of the kind?

A. No, sir.

Q. 175. Wasn't that your first sale in this territory?

A. Gallatin; yes, sir.

Q. 176. I mean Sumner County.

A. I believe so.

Q. 177. And isn't it a fact that the Standard Oil Company has been supplying oil here for many years?

A. Yes, sir.

Q. 178. And this was your first sale?

A. Yes, sir.

Redirect-examination.

By Mr. PECK, Attorney-General:

Q. 179. You were asked with reference to the market price of oils, and I believe you stated to Mr. Vertrees that where the Standard Oil Company has competition that they sold the same grade of oil that they were selling at Gallatin at a less price than they were charging the Gallatin people?

A. Yes, sir.

Objected to by defendants, because witness spoke as to this area and territory, and the markets about that.

By the COURT:

I think that is competent to show at other places, how it was there and how it is here.

By Mr. PECK, Attorney-General:

Q. 180. Mr. Honeywell, you say you are familiar with the character of oil the Standard Oil Company were selling to the people of this section?

A. Yes, sir.

Q. 181. At that time?

A. Yes, sir.

Q. 182. Now, state whether or not the price that the Standard Oil Company was demanding and receiving of the people of
144 Gallatin, or 13½ cents per gallon, was not excessive for that character of oil?

A. It was.

Objected to by defendants, because opinion and irrelevant and incompetent.

By the COURT:

I think you can show that they sold it at other places, no better located, for transportation than at Gallatin.

Exception by defendants.

By Mr. PECK, for the State:

Q. 183. Then, I will ask you whether or not this Standard Oil Company in places located at places no cheaper than Gallatin is located for transportation facilities, and all those matters considered, were they or not charging the people of Sumner County greater prices for oil than they were selling it for at other places?

A. They were.

Q. 184. How much per gallon were they charging these people than the other, where they had competition?

A. They were getting from four to five cents a gallon more for it here than at other points where the difference in price would not be more than half a cent or a cent at most.

Q. 185. You were asked about this entire car of oil being sold, and you say ten barrels were unsold.

A. There was a conditional understanding about these ten barrels; it was not an actual, outright sale.

Q. 186. I will ask you if or not those ten barrels were conditionally sold to a man named Lucas, a merchant in the town of Gallatin?

A. There was some sort of an understanding between our salesman and Mr. Lucas in regard to those barrels, and Mr. Lucas expected to effect the sale when he delivered the car load of oil.

Q. 187. That information was communicated to you at the home office by Roseman?

A. Yes, sir.

Objected to by defendants.

Objection overruled; exception by defendants.

Q. 188. The drum of gasoline you referred to was actually sold and delivered?

A. I delivered that myself when I came here for that purpose.

Q. 189. Mr. Honeywell, you were asked with reference to the capital stock of the Evansville Oil Company?

A. Yes, sir.

145 Q. 190. And the capital stock of your company at Pennsylvania?

A. Yes, sir.

Q. 191. I will ask you if you know anything about the capital stock of the Standard Oil Company?

A. Only from hearsay, and what I have heard.

Q. 192. Have you, or not, Mr. Honeywell, seen their published statements?

A. I have not that of the Standard Oil Company.

Q. 193. Of the Standard Oil Company, their literature and letter heads?

A. I have seen their letter heads.

Q. 194. In that way have you learned what the capital stock is?

A. I never have.

Q. 195. I believe you say that the capital stock of the Evansville Oil Company is eight thousand (\$8,000.00) dollars?

A. Yes, sir.

Q. 196. And as to the capital stock of the parent company, you don't know?

A. No, I have not. I have never had any actual duties in the home office.

Q. 197. I believe you stated to Mr. Vertrees that the independent companies, or company, independent of the Standard Oil Company, don't operate in this territory. Now, why is it that they don't?

A. Well, there are a few independent companies that are engaged in the marketing of oil, through sub-stations such as our own company. There are quite a number in the North and West, and but few in the South.

Q. 198. Now, in this territory, I believe you stated that there were no competitors to the Standard Oil Company?

A. There is another oil company in this territory, called the Cassetty Oil Company, of Nashville. They are not refiners, however; they, of course, are dependent upon various refining companies for oil; exclusively, I believe, at the present time, upon the Standard Oil Company.

Q. 199. But there is no refinery or manufacturer, such as you represent?

A. No, sir.

Q. 200. Why is that, and is, or not, this a fertile field to work in?

A. It is.

Objected to by defendants.

Objection sustained.

Q. 201. What is your territory—the Evansville Oil Company?

A. Our trade?

146 Q. 202. Your territory that you are confined to; that you don't go out of?

A. Southern Indiana, Illinois, Kentucky, Tennessee and along the Cumberland and Tennessee River valleys.

Q. 203. You don't go into Indiana or Missouri?

A. Indiana; yes, sir.

Recross-examination.

By Mr. VERTREES, for Defendant:-

Q. 204. Missouri?

A. Not except to a limited extent.

Q. 205. Very limited, isn't it?

A. Yes, sir; just go to the border.

Q. 206. Southern Illinois?

A. Yes, sir.

Q. 207. What place, situated as Gallatin is, was the Standard Oil Company selling oil at three cents or four cents less than it was here at Gallatin, at that time, this grade of oil?

A. You take Evansville, for instance, it would cost perhaps half a cent or a cent more to haul the oil down from the refinery than at Evansville, consequently it would cost them one cent more to market the oil and deliver it.

Q. 208. You had Evansville, Indiana, in mind?

A. Not only that, but scores of other towns.

Q. 209. I know, you named Evansville. What were you selling your oil for at Evansville?

A. We were selling oil, on an even plane with the Standard Oil Company. For instance, to-day——

Q. 210. I am not asking you that, but at that time?

A. It is difficult to remember.

Q. 211. That is what I thought. You don't really remember?

A. I cannot remember the exact figures, but I can tell you approximately.

Q. 212. At any rate, you were selling at the same prices at Evansville?

A. Same price for Ohio, for the Pennsylvania product we got considerably more.

Q. 213. What were you selling your Pennsylvania product for in Evansville?

A. I could not tell you that.

Q. 214. Try; you have some recollection, or had; you know you sold this here at 14½ cents?

A. Yes, sir.

147 Q. 215. Now, what were you selling your refined, double distilled, extra oil at there at that time?

A. I think we were getting——

Q. 216. At Evansville now?

A. I think we were getting 14 cents for it in barrels there.

Q. 217. What does that mean, I am talking about in bulk, the way you sold it here?

A. Perhaps 11½ or 12 cents, in bulk.

Q. 218. You were selling it at 11½ or 12 cents there?

Q. 219. And you were selling your Ohio oil at the same price they were?

A. Yes, sir.

Q. 220. Did you ship any Ohio oil into this territory?

A. We did not.

Q. 221. But you did ship into there?

A. Yes, sir.

Q. 222. And sold them over there?

A. Yes, sir.

Q. 223. And at the same price the Standard Oil Company was selling it for?

A. Yes, sir.

Q. 224. Now, where is Evansville located?

A. In Southern Indiana, on the Ohio River.

Q. 225. It is on the Ohio River?

A. Yes, sir.

Q. 226. One of the largest navigable rivers in the United States?

A. Yes, sir.

Q. 227. What railroads have you there?

A. We have several; Southern, Illinois Central, L. & N., E. & T. H.

Q. 228. You have four or five of those large trunk lines?

A. Yes, sir.

Q. 229. Reaching the various oil fields?

A. Not directly, but by connections.

Q. 230. And how does your oil come, by rail or river, ordinarily?

A. By rail, always.

Q. 231. It could come by river?

A. Not to an advantage.

Q. 232. Why?

A. Because it would have to come part of the way by rail.

Q. 233. But, you have four or five trunk lines?

A. Yes, sir.

Q. 234. Towards the various oil territories?

A. Yes, sir.

148 Q. 235. How large a place is Evansville?

A. The last census it had sixty thousand population.

Q. 236. How far is it from St. Louis?

A. About a hundred and seventy or eighty miles, I think, from St. Louis.

Q. 237. Now, when you have been talking about the Standard Oil Company did and did not do, what Standard Oil Company were you speaking of, the Standard of Kentucky?

A. They are all part and parcel of one, the Standard Oil Trust.

Q. 238. You know that, do you?

A. Yes, sir.

Q. 239. You think you know what their capital stock is, do you?

A. I think I do.

Q. 240. But you don't remember that of your own company?

A. No, sir.

Q. 241. And you don't know how many are associated in yours?

A. I have never been employed in the home office.

Q. 242. And you don't know how many concerns are associated together in your association?

A. The Independent Refining Company is an entirety of itself.

Q. 243. It is made up of something?

A. No, sir.

Q. 244. What is the big one?

A. The fact is, all in the hands of a few persons, the stock, but that is the individuals.

Q. 245. But then, it is a part of another with another name?

A. Only as individuals.

Q. 246. I don't care how they are a part of the association?

A. They are stockholders in the United States pipe line.

Q. 247. About how many of these various representatives of these independent refining companies are thus associated and connected in the United States Pipe Line Company?

A. I cannot tell you; there are several.

Q. 248. And then, isn't there one called the Pure Oil Company?

A. Yes, sir.

Q. 249. What is that?

A. They are the marketing company for various ones.

Q. 250. Who owns that; don't these independent companies?

A. Yes, sir.

Q. 251. Of which your company is a sub-agency?

A. Is one.

Q. 252. What is the capital stock of that Pure Oil Company?

A. I am not certain, but I think it is five million (\$5,000,000) dollars.

149 Q. 253. Isn't it nine million (\$9,000,000) dollars?

A. I think it is five million (\$5,000,000) dollars. I am not positive.

By Mr. PECK, for the State:

Q. 254. Now, I don't know that I understand you. State what you were charging the people of Evansville, Indiana, for the same grade of oil, the same character of oil shipped from the same place as that which you shipped to the people of Gallatin in the same quantities as you shipped to Gallatin?

A. I think we were getting about 14½ cents in barrels in Evansville.

Q. 255. Just as you shipped it to Gallatin?

A. Yes, sir.

By Mr. VERTREES, for Defendants:

Q. 256. You charged additional for the barrels, didn't you?

A. Yes, sir.

Q. 257. How much?

A. It costs on an average about three cents a gallon to barrel it, to cover the cost of glueing and painting, etc.

Q. 258. How much did you charge for the barrels in these sales?

A. We stipulated we would make a charge of one dollar for the barrel, and take it back for a dollar.

Q. 259. So, it cost you about one dollar and a half to do it?

A. Very nearly, but we make a nominal charge to keep track of the barrels.

Further this deponent saith not.

Filed Nov. 14, 1907. J. D. G. Morton, C. & M. (Trans. Vol. 1, p. 390.)

STATE OF TENNESSEE *ex Rel.*
versus

STANDARD OIL COMPANY OF KENTUCKY.

The depositions of O. T. Reynolds, Wm. M. Cassetty and James R. Mellwaine, taken by agreement of both parties, on this 2d day of November, A. D. 1907, in the city of Nashville, Tenn., to be read as evidence on the trial of the above entitled cause, on behalf of complainant.

Taken in the presence of C. T. Cates, Jr., Attorney General, appearing on behalf of the State; John J. Vertrees, Esq., representing the defendant, and Buford Duke, Stenographer and Notary public.

150 Caption, certificate and all formalities expressly waived.

And it is agreed that the stenographer, who is a Notary Public, may swear the witnesses, take down their depositions in shorthand, transcribe the same into typewriting, and sign the names of the witnesses to their respective depositions, the signature of the witness thereto being expressly waived.

Said witness,

O. T. REYNOLDS, called on behalf of the complainant, being first duly sworn, deposed as follows:

Direct examination.

By Mr. CATES, Attorney General:

Q. 1. State your name and age, and your place of residence?

A. O. T. Reynolds, age thirty-two years, and residence Dover, Tenn.

Q. 2. What is your occupation?

A. Hardware business.

Q. 3. How long have you lived in Dover, Tennessee, Mr. Reynolds?

A. Six years, this month.

Q. 4. Is Stuart County your home?

A. Yes, sir.

Q. 5. Were you formerly engaged in business as an agent for the Standard Oil Company, at Dover, Tennessee?

A. Yes, sir.

Q. 6. Now, just state what your duties were as agent of the Standard Oil Company at that place?

A. Well, my duties were to look after the tank wagon, to sell

oil from the tanks that were located at Bear Springs, and one at Erin; I deliver coal oil in Stuart, Houston, and a part of Dickson County.

Q. 7. Was the oil of the Standard Oil Company which was stored in tanks in Bear Springs and Erin, for the purpose of supplying the territory you have named which was under your charge?

A. Under my charge, yes, sir.

Q. 8. And you say you operated the tank wagons that went around over the country, distributing oil to the customers?

A. No, sir, I didn't operate the wagon; I never went to Erin often, never was at the Bear Springs tank, but two or three times, to look after business, but I had a driver to operate them for me.

Q. 9. Then, it was operated under your direction?

A. Yes, sir.

151 Q. 10. They furnished the tank wagon?

A. Yes, sir.

Q. 11. And you furnished the driver?

A. I furnished the driver and the team.

Q. 12. And you paid the driver?

A. Yes, sir.

Q. 13. How did you receive your compensation?

A. Well, as I remember, I turned in everything as Standard Oil Company; they would not allow me to carry no bank account, and I took personal checks for this business, turned it in to the bank, bought exchange and sent it in to the company; then they figured on the amount of oil sold and sent me the check. Just what my compensation or commission was, I could not say. They figured it out at the house.

Q. 14. Did you receive so much per gallon?

A. I could not tell you that, I reckon that was the way they based my compensation on the number of gallons sold, and that was figured at the Louisville office.

Q. 15. Who was your superior?

A. Well, Mr. —, I can not think of his name, a man by the name of Carrico, a heavy-set man, light hair.

Q. 16. What did he do?

A. He came down and checked me in and I took the business; he gave me prices and stationery, and showed me the tank, and he went down to measure the tank. Of course, I didn't know anything about that, and he visited there; when any contention would come up, he would come down and look after this matter.

Q. 17. State whether or not he gave you instructions in regard to carrying on the business, and the manner in which it should be carried on?

A. Did he give me these instructions?

Q. 18. Yes, with reference to the manner of carrying on the business?

A. No, sir; not specially did he do this; he told me to wait on the parties about at the different places; and send this wagon out, a regular routine of business; he had nothing to do with that.

Q. 19. Did you come in personal contact with any other superior officer of the Standard Oil Company, other than Mr. Carrico?

A. You mean personally now?

Q. 20. Yes?

A. No, sir.

Q. 21. Now, I will ask you to state whether you made reports to the Louisville office?

A. Yes, sir; I had forms to make daily reports on, and weekly reports, and then monthly reports.

152 Q. 22. Dover was under the jurisdiction of the Louisville office, as I understand?

A. Yes, sir.

Q. 23. Who was in charge of the Louisville office?

A. That I made my reports to?

Q. 24. Yes?

A. Mr. Coons.

Q. 25. Was it Mr. S. W. Coons?

A. I think that is it, as well as I remember.

Q. 26. Did you ever meet him personally?

A. No, sir, I never did.

Q. 27. Now, about how long were you the agent of the Standard Oil Company at Dover?

A. As well as I remember, it was something like three months. If I remember right, I took it in the fall of the year, and something like February; I could not tell exactly, but it was after the beginning of the year, though, that I was checked out.

Q. 28. You mean, that you entered upon your duties as agent some time in the fall of the year, and your connection with the Standard Oil Company ceased in the following February?

A. Yes, sir.

Q. 29. In the fall of what year?

A. If I remember right, it was 1903.

Q. 30. With that, commenced your services as local agent of the Standard Oil Company at Dover?

A. Yes, sir.

Q. 31. Then, your services were dispensed with in February of 1904?

A. Something like that; I only kept it something like three months; I could not tell just when, but I am under the impression it was about three months.

Q. 32. Who was the driver of your tank wagon?

A. A man by the name of Fisher carried it most of the time; well, he carried it all the time.

Q. 33. Do you know where he is?

A. He was in Fisher, La., and went from there somewhere in Texas.

Q. 34. You don't know where he is now?

A. No, sir.

Q. 35. Now, I will ask you to state whether or not there is a little place in Stuart County called Tharpe?

A. Yes, sir.

Q. 36. Is there a merchant there by the name of Scarabrough?

A. There used to be; well, he is there now, but he is not in business.

153 Q. 37. How far is Tharpe from Dover?

A. Something like nine or ten miles.

Q. 38. I will ask you if Merchant Scarabrough bought oil from the Standard Oil Company?

A. Not while I had charge of the tank wagon.

Q. 39. Do you know from whom he bought oil?

A. No, sir, I am not positive; I could not say.

Q. 40. I will ask you, to refresh your recollection, if he was purchasing oil from the Evansville Oil Company?

A. Not that I know of, no, sir; not personally. My driver told me that he was getting oil——

Objected to by defendant, because hearsay and incompetent.

Q. 41. Do you know, of your own knowledge, whether or not he was selling a grade of oil called "Headlight?"

A. No, sir, I do not.

Q. 42. But he was selling kerosene and other oils down in that locality?

A. Yes, sir, he was selling it.

Q. 43. I will ask you to state whether Carrico, who was the traveling auditor, as you have described, or some kind of an agent or officer of the Standard Oil Company, had a talk with you about Scarabrough and his sales of oil, other than the Standard Oil Company's oil?

A. Now, just how was that, General?

Q. 44. I will ask you whether Mr. Carrico had any talk with you about Scarabrough's business?

A. Relative to the sale of oil in that territory?

Q. 45. Yes?

A. Yes, sir.

Q. 46. Now, just state what he said to you, and how it came up?

A. Well, he drove in one day from—as well as I remember, I will not say positively—but he came from that section of country, he might have driven in from Cadiz, but, at any rate, he came up between the rivers, and I think he had met the wagon and asked why it was we were not selling Dr. Scarabrough, and I said I didn't know; the tank wagon had never sold him since I had handled the tank wagon, and he says he is evidently selling another oil, and he said, you have Fisher, your driver, to get some tanks, five-gallon tanks, or cans, and when he is down in that neighborhood deliver this oil to these parties free of charge from the Standard Oil Company wagon and charge it back to us; that is Mr. Carrico's conversation with me.

Q. 47. What effect did Carrico say that would have on Dr. Scarabrough?

154 A. Well, he just said, we will try and see if we can not force him, get him, to take oil from the wagon, or get him to take oil from the wagon.

Q. 48. From where were you to secure these five-gallon cans?

A. He told me I could get these cans from the Louisville office; that by writing to Louisville, I could get them.

Q. 49. To whom were you to have Fisher distribute them or place them with?

A. He never said; in that neighborhood, though.

Q. 50. To customers of Scarabrough?

A. In the neighborhood of Scarabrough's trade.

Q. 51. Did you do it?

A. No, sir, I didn't do it.

Q. 52. Now, about when was that, Mr. Reynolds?

A. Well, it was somewhere about the first of the year 1904; it might have been in December, or might have been in January, but I am rather inclined to think it was in January. But, somewhere along towards the latter part or first of the year.

Q. 53. When Carrico instructed you to do that, what did you do then?

A. Well, I went to see my lawyer, and asked him what about this *thing*.

Q. 54. Now, after you had your conference with your lawyer—I will not ask you to state what he told you, as that might not be competent—but I will ask you whether or not you pursued Carrico's instructions?

A. No, sir, I did not.

Q. 55. Did that please Mr. Carrico?

A. I could not tell you whether it did or not.

Q. 56. Now, what business were you engaged in then?

A. Well, I was in the hardware business at that time, and also in the livery business.

Q. 57. Up to that time, had Carrico been taking his livery from you, when he wanted to go around over that country?

A. Pretty well all the time.

Q. 58. Did he afterwards do it?

A. I don't think he ever took any other drive with me.

Q. 59. Did he come about you any more?

A. Not very much, no, sir.

Q. 60. Now, after that, were you discharged?

A. I think it was some time in February; I could not tell the dates, something like a month or six weeks later on, possibly. I wasn't discharged, the wagon was called for, and the books and papers, and everything.

Q. 61. That terminated your connection with the company?

A. Yes, sir; but I don't remember just what time.

155 Q. 62. Did Carrico ask you why you would not do it?

A. No, sir.

Q. 63. Did you tell him you had been to see your lawyer?

A. No, sir.

Q. 64. Well, what did you tell Carrico when he told you he wanted you to do this thing, or pursue this plan that he had outlined?

A. I told him I was a little bit dubious of the business; from the fact that I had seen something in the paper was the reason I went to my lawyer and asked about it. Now, as well as I remember, there

was something in the paper about the Standard Oil Company, and somebody who had given oil away, and that was what made me go to see my lawyer.

Q. 65. And, after your conference with your lawyer, you declined to have anything to do with it?

A. Anything to do with it in the shape of giving away oil.

Q. 66. Or distributing oil that was not paid for, was that what you told him?

A. Yes. No, I didn't tell Carrico anything; I just told him I could not do that.

Q. 67. Didn't give him any reason or details?

A. No, sir, I didn't give him any reasons.

Q. 68. But just told him you could not do it?

A. Yes, sir.

Q. 69. Since you came here today you have been introduced to Mr. S. W. Coons, haven't you?

A. No, sir.

Q. 70. Don't you know he is present?

A. I heard you introduce him as Mr. Coons awhile ago.

Q. 71. You had never met him?

A. No, sir.

Q. 72. But he is here present, now?

A. You asked in the beginning if I *knowed* him, or had met him, but I had not; I knew he was in the room, though.

Q. 73. You never saw him before today?

A. No, sir, I never saw Mr. Coons before today, but I knew there was a Mr. Coons in the room here?

Defendant, reserving all exceptions to the testimony of Mr. Reynolds as to conversations with Mr. Carrico, proceeds to cross-examine the witness as follows:

Cross-examination.

By Mr. VERTREES, for defendant:

Q. 74. What is your business now?

A. Selling hardware.

156 Q. 75. Do you sell coal oil?

A. No, sir. Do you mean do I sell it out of my place of business?

Q. 76. No, anywhere?

A. I retail oil, yes, sir.

Q. 77. At your store?

A. Yes, sir.

Q. 78. Did you retail oil at the time you were acting as agent for the Standard Oil Company?

A. Yes, sir.

Q. 79. And prior to that time?

A. Yes, sir.

Q. 80. Is there any fact or circumstance by which you can fix the date precisely when you were agent?

A. No, I can not; I burned all the papers I had; I kept them

something like two years, and we moved and I destroyed all the papers.

Q. 81. But you were down at Dover merchandising and dealing in coal oil at the time you had this agency, and for a long time before that?

A. Yes, sir. Not so very long, though.

Q. 82. How long?

A. I was two years there in the business. The business was under the head of J. M. Allen & Co., but I was a partner with J. M. Allen in the livery and hardware business. He looked after the hardware and I the livery, and I took the Standard Oil business as my individual business.

Q. 83. Well, you continued to be connected with the hardware business?

A. Yes, sir.

Q. 84. So, in point of fact, since, say, 1901, or thereabouts?

A. I think it was in November, 1901.

Q. 85. I was going to say that since November, 1901, until now, you have been in the hardware business in Dover, and in it you have been selling coal oil?

A. Yes, sir, most of the time.

Q. 86. Before you became agent for the company, from whom did you get your oil?

A. Sometimes from Evansville, and sometimes from the Standard Oil Company.

Q. 87. And since then?

A. The same way; sometimes buy from one and sometimes buy from the other. As a general thing, through the winter season, we buy from the Evansville people.

Q. 88. But you have, all the time, bought from both?

A. Yes, sir; I think the last coal oil we bought, I don't remember, but I think it was a few days ago, bought from the Standard Oil tank wagon.

Q. 89. Did you say that your agency was under the Louisville office?

A. Yes, sir.

Q. 90. And you reported to it daily?

A. No, sir, I can't say I reported daily; I made my daily reports and sent them in weekly.

Q. 91. Whatever reports you made you sent to the Louisville office?

A. Yes, sir.

Q. 92. And you understood you were under the direction and control of Special Agent Coons?

A. Yes, sir.

Q. 93. Do you remember his name?

A. No, sir, but I think it was S. W.

Q. 94. And he was located at Louisville?

A. Yes, sir.

Q. 95. All your correspondence was with him?

A. With the Louisville office, yes, sir.

Q. 96. And you looked to him for orders of all kinds?

A. Yes, sir, of all descriptions.

Q. 97. Now, who was Mr. Carrico, Mr. Reynolds?

A. He was a traveling man. I don't know whether you call him traveling auditor; he was in that capacity, I suppose, when he met me; he checked me in. Later on, Carrico visited there as an adjuster of trouble.

Q. 98. What kind of trouble do you refer to?

A. Well, in regard to kicks on oil, you know.

Q. 99. In other words, if there was any trouble or complaint, Mr. Carrico was the man that came around?

A. He was one of the men.

Q. 100. Who was the other?

A. I don't remember the man's name, but we had other people from the Standard Oil Company, and one man, I don't know his name, I would not say.

Q. 101. What else did Mr. Carrico do besides adjust troubles?

A. I think he was selling some lamps of the Standard Oil Company, showing them. It might have been he had the lamps in showing the oil. Yes, he did sell them, too, for I am satisfied he sold some lamps.

Q. 102. Was he a traveling salesman of oil; did he sell any oil?

A. I don't think he did; no, sir.

Q. 103. But he was going around with lamps, selling them, and he was also adjuster of troubles of the Standard Oil Company?

A. Yes, sir.

158 Q. 104. If he ever sold any oil, you don't know it?

A. No, sir; I could not say that; I don't know.

Q. 105. And you got your orders from Louisville and not from him:

A. Yes, sir.

Q. 106. And you didn't get any orders from him?

A. I don't think I got any orders from him; there might have been a change of prices he gave me.

Q. 107. But, if he did, you don't recall it?

A. I would not be positive, but I think one time there was.

Q. 108. How was that?

A. I told you I was under the impression there had been a change in prices, but I would not be positive whether Mr. Carrico gave it to me, or whether I got it from Louisville from a letter.

Q. 109. Wasn't the course of business such as that you got prices and change of prices from Louisville to you?

A. Well, yes; that is what I said.

Q. 110. So, if there was anything through Carrico you don't now recall it?

A. I don't recall it; no, sir; I would not make a positive statement.

Q. 111. How far is Tharpe from your place?

A. The liverymen call it nine miles; it is something in that neighborhood.

Q. 112. And you took, on your own account, this matter of the agency of the Standard Oil Company; that is, not on the account of the firm, but for yourself?

A. Yes, sir.

Q. 113. If I understand you, you were in this situation: you had teams, and your idea was you could get the agency and use your teams and pay for your man and make some money?

A. No, sir; not the livery team; I bought a team outside, and made it personal throughout.

Q. 114. Who was your predecessor in the agency?

A. I cannot remember.

Q. 115. You don't know whom you succeeded?

A. I believe it was J. D. Wetton, but I am not sure.

Q. 116. Was there anybody after you were there?

A. Yes, sir.

Q. 117. That ran the wagons?

A. Yes, sir; a man by the name of L. E. McCraw, or L. E. McCraw & Co., succeeded me.

Q. 118. Do you know whether your predecessor had sold Dr. Scarabrough?

A. No, sir.

159 Q. 119. You only know your wagon was going down in all that country and delivering the oil to the various merchants, and that it didn't sell him any.

A. No, sir.

Q. 120. You think you remember that?

A. I don't think it sold him any oil.

Q. 121. And that one day Mr. Carrico met your wagon out on the road and found that to be a fact?

A. Yes, sir.

Q. 122. And he came in and asked why you didn't sell Dr. Scarabrough down at Tharpe?

A. Yes, sir.

Q. 123. And you told him you didn't know?

A. Yes, sir.

Q. 124. Was that all of it; wasn't there any further discussion?

A. No, I think not regarding why I didn't sell him.

Q. 125. What was it you said Mr. Carrico said to do about the five-gallon cans?

A. He told me, could get these five-gallon cans and have them with the tank wagon, such as milk buckets, give these people in that territory a five-gallon can of oil wherever they would meet the wagon and take it.

Q. 126. What people?

A. The people in the territory around where Dr. Scarabrough did business, in his trade territory.

Q. 127. Now, what people did he say?

A. Didn't specify any names; I don't suppose he knew, and I could not recall any names now that live right in that neighborhood.

Q. 128. So he said he thought it would be a good idea, in order to make Scarabrough buy from you, would be to give some oil away down in that country?

A. Yes, sir; in that territory.

Q. 129. Did he say how much?

A. No, sir.

Q. 130. And he said you could write to Louisville and get the cans?

A. And get the cans; yes, sir.

Q. 131. And then you could give the oil away?

A. Yes, sir.

Q. 132. And, as I understand it, you didn't write to Louisville?

A. No, sir; I don't think I did; I know I did not.

Q. 133. You didn't bring that to the attention of the Louisville office?

A. No, sir.

160 Q. 134. And no such cans had ever been furnished to you?

A. No, sir.

Q. 135. You hadn't been giving oil away to anybody?

A. No, sir.

Q. 136. The Louisville office had never directed you to do anything of that kind?

A. No, sir; not by letter.

Q. 137. In any way, the Louisville office?

A. No, sir; the Louisville office had not.

Q. 138. The only conversation you had with anybody, as I understand you on this subject, was this conversation with Mr. Carrico?

A. Yes, sir.

Q. 139. And, in point of fact, you had not given away any before that?

A. No, sir.

Q. 140. And you didn't give any away afterwards?

A. No, sir.

Q. 141. And, in point of fact, you didn't communicate with the Louisville office on the subject, as he suggested?

A. As Mr. Carrico suggested?

Q. 142. Yes?

A. No, sir.

Q. 143. Did you ever inform the Louisville office of the conversation you had?

A. I think not; I dropped it right there.

Q. 144. Did any lawyer advise you it would be a violation of law to do that thing Mr. Carrico suggested, to give cans of oil away to anybody that would take it?

A. I cannot say that he advised me to do this; I laid the case before him and asked his advice, and as I stated awhile ago, there was trouble in the papers about that time.

Q. 145. I just wanted to know if any lawyer in Tennessee, in Dover or anywhere else, advised you that would be an unlawful thing, to give away oil?

A. He just said, you lay off of it; don't you do it.

Q. 146. Did he say it was unlawful?

A. I cannot recall that he said it was unlawful; he said, you keep out of trouble, and lay off of that. I would infer from his statement he thought I would have committed myself.

Q. 147. As I understand, Mr. Carrico suggested to provide your

tank wagon with five-gallon cans of oil and give it to any of those people that would take it?

A. Yes, sir; that was as I understood it; supply myself with empty cans, and when he got in this territory, this immediate trade territory, and give it to anybody that would take it.

161 Q. 148. And that was all there was of it?

A. Yes, sir.

Q. 149. Didn't relate to any special contract?

A. No, sir.

Q. 150. But, just go down and give oil away in that territory?

A. Yes, sir; he didn't say how often, or how many times, or how many people to give it to.

Q. 151. If you had done such a thing as that without authority from Louisville, would not you have been charged with the oil?

A. I am satisfied that is the fact.

Q. 152. Weren't you, in fact, charged with all the oil you received?

A. Yes, sir; I reckon I was.

Q. 153. Didn't they have a way of measuring the oil?

A. Yes, sir; had a way of measuring the tank.

Q. 154. Wouldn't the tank, every month, what they called your inches in the tank?

A. Yes, sir.

Q. 155. And if there was any discrepancy in your inches and your report, they would call it to your attention, and say, how is this?

A. Yes, sir.

Q. 156. Did such a thing as that happen occasionally?

A. Yes, sir.

Q. 157. It will happen, in the course of business, necessarily?

A. Yes, sir. We were required to take the number of inches in the tank, and report after each tank wagon was filled up, I think. I think that was the case. I didn't do that, but the driver did that, and I think he reported that to me.

Q. 158. Did you ever instruct your driver to take the cans down in that part of the country?

A. No, sir.

Q. 159. Never sent any?

A. No, sir.

Q. 160. And never had any conversation with the driver on that subject?

A. No, sir.

Q. 161. In other words, you didn't like the proposition and you just didn't take to it?

A. No, sir.

Q. 162. Did Mr. Carrico ever ask you why you didn't do it?

A. No, sir.

Q. 163. Did you ever have any other conversation with him on the subject?

A. No, sir.

162 Q. 164. Just that one conversation?

A. Just that one conversation; yes, sir.

Q. 165. Did you ever see Carrico any more?

A. Yes, sir.

Q. 166. And he didn't ask you anything about it?

A. No, sir.

Q. 167. Nor about Scarabrough?

A. No, sir.

Q. 168. And about whether you were getting his trade or not?

A. No, sir.

Q. 169. Or whether you had done this thing?

A. No, sir.

Q. 170. Now, you have said you only remained for a short time. Did you mean to make the impression that the Louisville office discharged you or took the business away from you because you had not done that thing?

A. No, sir; I didn't say that.

Q. 171. I felt sure you had not.

A. I said I only remained in the business a short time; I don't know why I was checked out.

Q. 172. Do you know anything about that; have you any knowledge?

A. No, sir; I could not make a statement on that.

Q. 173. Was there any other matter of complaint between you and the Louisville office?

A. No, sir.

Q. 174. Got along harmoniously?

A. Yes, sir.

Q. 175. So far as you know, they didn't know of this?

A. I don't know that they did; never said anything to me about it.

Q. 176. And never made complaint about anything?

A. Once or twice they gave me a jacking up about not going to some place.

Q. 177. In other words, they felt there were certain places you ought to send your wagon?

A. Yes, sir.

Q. 178. That was with a view to pushing your business?

A. Yes, sir.

Q. 179. They had an idea you were not pushing your business?

A. Yes, sir; in certain localities.

Q. 180. What were those localities?

A. Well, one was Tobaccoport; I think they wrote me a time or two in regard to the business at Tobaccoport; that I ought to go down there.

163 Q. 181. And you didn't think you ought to bother with that?

A. Yes, sir; and I still think so.

Q. 182. And that was the idea; you differed about it?

A. Yes, sir.

Q. 183. They thought you ought to go?

A. Yes, sir.

Q. 184. And wrote you more than once?

A. I think a time or two.

Q. 185. And they wrote you to go and you didn't go?

A. No, sir; I didn't go, to say the least of it.

Q. 186. And they were insisting on it?

A. Once or twice; I will say once, anyway.

Q. 187. Was there any other place?

A. No, I don't think there was.

Q. 188. Where were your tanks located?

A. Bear Springs, and one at Erin.

Q. 189. How far are they from your home, at Dover?

A. The tank at Bear Springs is about six miles from Dover, and the other tank is something like eighteen or twenty miles, the direct road.

Q. 190. You were local agent in charge of those two tanks?

A. Yes, sir.

Q. 191. Did you have one at Dover?

A. No, sir.

Q. 192. Now, how often did you say you went to Bear Springs, personally and individually?

A. I don't know; I could not say; I was over there every few days.

Q. 193. And Erin?

A. I never did go there; never went there to be checked in or checked out.

Q. 194. During the three whole months you were agent, you didn't go there?

A. No, sir; I was represented by my wagon driver.

Q. 195. As a rule, those drivers, while you believe them to be responsible, they are a cheaper order of men?

A. I suppose so; I hired him cheaper than I could do the business.

Q. 196. You didn't expect to drive an-way?

A. No, sir.

Q. 197. But, you say you never went to the Erin station in your life while you had charge?

A. No, sir; not while I had charge.

Q. 198. But your driver was going there and getting oil, or should do it?

A. Making regular trips there.

164 Q. 199. He was supposed to do that?

A. Yes, sir; he looked after the Erin tank a good deal more than the Bear Springs tank, from the fact that the places were better and easier to make, and didn't have to make such long trips.

Q. 200. You had no authority to fix prices yourself, did you, Mr. Reynolds?

A. No, sir.

Q. 201. That was done by the Louisville office for you?

A. That was done by the Louisville office. As I said, Mr. Carrico checked me in and gave me the prices.

Q. 202. When he put you in?

A. Yes, sir; and wrote the prices down for me.

Q. 203. But, from that time they came from the Louisville office?

A. Yes, sir.

Q. 204. And didn't he tell you that you would look to that office afterwards, after that?

A. I don't remember that he did.

Q. 205. But you did that, in point of fact?

A. Yes, sir; the letters led up to that.

Q. 206. Now, you have been examined in this case as a witness by the Attorney-General. How did he know you had this conversation four years ago with Mr. Carrico?

A. Well, General Brandon called my attention to the matter something like two weeks ago, I believe.

Q. 207. What did General Brandon know about it?

A. How did he know about it?

Q. 208. Yes?

A. He was my lawyer, and I went to him for advice.

Q. 209. He called your attention to it?

A. Yes, sir.

Q. 210. Had he brought it to the attention of the Attorney-General?

A. I don't know.

Q. 211. Did General Brandon advise you that this was a criminal or illegal thing Mr. Carrico had suggested?

A. No, sir; he didn't say so.

Q. 212. You have been doing business a long time and as a merchant; haven't you given away many articles of merchandise to secure trade?

A. Not so many; I am not so very giving.

Q. 213. You have done that, though, more than once?

A. I cannot say very much.

Q. 214. Not so much; but don't merchants do business that way?

A. Some do.

165 Q. 215. Don't your competitors frequently do that way?

A. They may do it; I don't know.

Q. 216. To your knowledge?

A. I could not say.

Q. 217. Haven't you?

A. I have never done it very much.

Q. 218. I am not on the "much" now. You have done that thing; now, haven't you given away articles of merchandise, absolutely as gifts, to people to secure their trade and to build up your business?

A. I don't know whether that has anything to do with this line of business.

Q. 219. There is nothing criminal about it, is there?

A. I don't know whether that relates to this business or not.

Q. 220. I think it is proper. Don't every merchant do that?

A. I think very likely they do.

Q. 221. Wouldn't they go under pretty soon if they did not?

A. I don't know; some might and some might not.

Q. 222. Now, getting down to you, you have done that?

A. Given it away?

Q. 223. Yes, articles of merchandise and commodities in order to build up your business, and isn't it considered part of legitimate merchandising?

A. I suppose it is a part of it; yes, sir.

Q. 224. Now, let us talk about your part. Haven't you done it?

A. I said before I wasn't very elastic.

Q. 225. You said you didn't give much?

A. I still say I don't give very much.

Q. 226. We will leave out the much of it; you do give some; that is true, isn't it?

A. Well, you have my statement there, I think.

Q. 227. You prefer for it to go at that, do you?

A. Yes, sir; I prefer for it to go at that.

Q. 228. Did you, though, ever give away any coal oil while you were agent of this company, any of the company's oil?

A. No, sir.

Q. 229. Did Mr. Fisher, to your knowledge?

A. No, sir.

Q. 230. If he did, it was not by your direction or with your consent?

A. No, sir; it was never reported to me.

Q. 231. And I believe you said Mr. Fisher was the only driver you had?

A. The only driver I had; yes, sir.

166 Redirect examination.

By Mr. CATES, Attorney-General:

Q. 232. You have been asked about merchants giving away things. Do you know of any habit or custom of merchants in Stuart County and that community to surround the business of one of their competitors and give away a lot of business in their neighborhood, to force that particular merchant to buy from the giver-away of the stuff?

A. No, sir, I don't know of anything of that kind, I don't believe.

Q. 233. Now, you were asked about the manner in which you carried on your business, and you stated that you never went to Erin, because Mr. Fisher went there?

A. Because Fisher went there.

Q. 234. And you were then asked if Mr. Fisher was not a cheaper man. I will ask you if Mr. Fisher wasn't an experienced man in the business, and hadn't he been in that business before you took the local agency of the Standard Oil Company?

A. Yes, sir.

Q. 235. He was a thoroughly competent man?

A. Yes, sir, and so considered by everybody.

Q. 236. And reliable in every way?

A. Yes, sir.

Q. 237. And you were content for him to check you in at Erin, and to check you out?

A. Yes, sir; I put the entire business with him.

Q. 238. You were also asked if complaint had been made about the manner of your business, and you said you had been written to about not going to Tobaccoport?

A. Yes, sir.

Q. 239. Where was that; how far away?

A. I believe it is eighteen miles from Dover.

Q. 240. Were those letters written before or after Mr. Carrico came there and tried to get you to give away the oil in Scarabrough's territory?

A. I don't know; I can not remember about that.

Q. 241. Was there any complaint made by the company at any other part of your business, or at any of Fisher's actions?

A. No, sir, I think not.

Q. 242. Did Mr. Carrico or any other agent or officer of the company ever criticize the manner in which you were carrying on your business?

A. I think not.

Q. 243. Did the company, or Mr. Coons for the company, when you were jacked up, and when you were checked out, and in 167 that way your connection with the Standard Oil Company ceased, give you as a reason that they were discharging you because you had not gone to Tobaccoport?

A. No, sir.

Q. 244. Did they give any reason for it?

A. No, sir, and I don't know until today why it was done.

Q. 245. Now, you were asked by Mr. Vertrees if you ever had any talk with the driver about giving away that oil down there. I will ask you to state whether or not you had any talk with the driver about Mr. Carrico having the same talk with him that he had with you?

A. No, sir, never did.

Q. 246. With Mr. Fisher?

A. No, sir.

Q. 247. Didn't Mr. Fisher tell you?

A. I don't know whether he ever did or not.

Q. 248. About a conversation with Mr. Carrico?

A. No, sir, I don't remember; I could not say that.

Q. 249. You say you went to see your lawyer?

A. Yes, sir.

Q. 250. And it was upon his advice to stay off of it that you did stay off of it?

A. Yes, sir.

Q. 251. And you don't know how Gen. Brandon came to see you a week or so ago and ask you, or to tell you, that you would be wanted to come to Nashville to testify in this case?

A. No, sir; I could not tell you the reason; I was out of town, and my father and partner of mine says Gen. Brandon has been over here once to see you, and he wants to see you, and he says, you call there tomorrow, and I went over and he read a letter from you

asking me if I knew anything about this. Now, how came you in possession of the fact, I don't know.

Q. 252. Now, you have been asked considerable on cross-examination about these five-gallon cans that you were to send to Louisville and get, Carrico stated, upon application they would be furnished by the Louisville office?

A. He said you can send there and get these five-gallon milk cans on a form—on regular form I did business on—if I wanted any supplies, I suppose. I don't remember whether I had that form or not.

Q. 253. Was the suggestion or request that Mr. Carrico made to you that you give away the oil, at your own expense, or was it to be given away for the Standard Oil Company?

A. The way I understood it, it was to be given away from the Standard Oil Company, and charged back, and adjusted by him.

168 Q. 254. Adjusted by him?

A. Adjusted by Mr. Carrico, I don't know. I wasn't to look to this Louisville office at all. I was just to give away the oil and he would adjust the matter with me.

Q. 255. Adjust your end of it, and also the Louisville end of it?

A. I suppose so; he didn't say that.

Q. 256. It wasn't to be charged to you?

A. That was the way I understood it. He would adjust that end of it, but didn't tell me what disposition he intended to make of it.

Q. 257. That was his end—that he would adjust it; that was his language?

A. He would adjust it, yes, sir.

Q. 258. He did go down in your neighborhood, later on?

A. Yes, sir; later on he went through that neighborhood.

Q. 259. And after that, do you know whether Dr. Scarabrough got to buying some oil from the Standard Oil Company?

A. No, sir, I could not say.

Q. 260. Do you know where Mr. Carrico is now?

A. No, sir.

Recross-examination.

By Mr. VERTREES, for defendant:

Q. 261. You have brought out the question of adjustment. Now, in a way, I did not quite understand you to say before, and I wish to understand that more clearly. Do I understand you to say that Mr. Carrico said that the Louisville office was to have nothing to do with this business?

A. No, sir, you didn't understand me. I said I didn't know anything about the Louisville office. Mr. Carrico said he would adjust the matter.

Q. 262. Did you mean to convey the impression that you were to make no report of such oil as you gave away to the Louisville office?

A. That was to be made on regular form?

Q. 263. To whom?

A. He didn't say. I didn't give it away. I don't know.

Q. 264. The way Mr. Carrico fixed it up was the Louisville office to know, or not to know of that oil-giving-away business?

A. I suppose they would have had to know. I had but one form.

Q. 265. I gathered the impression from what you said—I may have misunderstood you, but I gathered the impression that
169 you meant to convey the idea that Mr. Carrico's proposition — that he would adjust it?

A. That is it.

Q. 266. And that it would not go to the Louisville office at all?

A. I don't know what disposition he would make of that, but he said he would adjust this matter with me; didn't explain that.

Q. 267. What did you understand?

A. I suppose, likely, that he would take up this form himself.

Q. 268. Did you understand from your conversation, as put to you by Mr. Carrico, did you understand him to say to you, "You give this oil away, and it will be adjusted between me and you?"

A. And he would take it up with the Louisville office.

Q. 269. And you should not report it?

A. I don't know. I didn't do it, and I can not recall whether he said that or not, what was to be done.

Q. 270. You had no idea on that proposition?

A. I have an idea, very likely.

Q. 271. I want to know what his idea was you were to work out?

A. His idea was I was to give the oil away, and very likely charge it up to leakage account. I don't know what he aimed to do.

Q. 272. I want to know if it went far enough for you to know the way the thing should be done?

A. No, I can not say it went far enough to know how it was to be done.

Q. 273. Did you get the idea it was to — charged over to leakage account, or some way?

A. I didn't get the idea from him.

Q. 274. Where did you get that idea? You have expressed it?

A. Well, on that question, as you said, by giving away things a man has a right to his opinion, and this leakage has to come somewhere.

Q. 275. There is a leakage in the business?

A. Yes, sir.

Q. 276. That you cannot help?

A. Yes, it is unavoidable.

Q. 277. Did you get the idea from Mr. Carrico, this oil was to be given away, and in your report accounted for as leakage of oil?

A. I can say he never left that impression on me; he never made that on me.

Q. 278. He never said that?

A. He never said that, no, sir, but I got that impression, because there is a certain amount of leakage in the wagon business.

170 Q. 279. Sometimes it is more than it ought to be?

A. No, I cannot say it is more than it ought to be.

Q. 280. Particularly, if you get a dishonest driver?

A. I had an honest driver.

Q. 281. But, if you have a dishonest driver. I am on the driver now?

A. I don't know about that.

Q. 282. You can say this man made this proposition to you—to give away the oil, Mr. Carrico did?

A. Yes, sir.

Q. 283. And you can say you got the idea—without his saying so—that that oil was to be accounted for on leakage basis?

A. I got that on my own hook. He never told me how to dispose of it.

Q. 284. But you can gather, frequently, from what a man does, or from a man, without reference to what he says, what is in his mind?

A. Yes, sir.

Complainant objects to any further endeavor to go into the matter of opinion impressed upon the witness by anything Mr. Carrico said.

Q. 285. As the result of it, you left there with the impression and understanding in your mind?

A. That I wasn't going to give away any coal oil until I saw my lawyer.

Q. 286. But you had an impression that Mr. Carrico's idea was if you did it should be covered in the leakage account?

A. It never occurred to me, then, what I was to do with it if I gave it away. Later on, after I left Carrico——

Q. 287. When it did occur to you that was the way it was to be covered?

A. That was an opinion of my own. It would have to come somewhere, unless it went through a form.

Q. 288. And, therefore, you dropped it?

A. Yes, sir.

Q. 289. Did you have any cans there at that time?

A. No, sir; no cans there while I was in the business.

Q. 290. It wasn't the understanding, in ordering cans from Louisville, you would tell the company what you wanted with them?

A. No, sir.

Q. 291. That you wanted to give away oil?

A. No, sir; he just told me I could get cans.

Q. 292. That would be by the form order?

A. I suppose.

171 Q. 293. If you had wanted to do it, you would have sent in an order for so many five-gallon cans?

A. Yes, sir.

Q. 294. In point of fact, don't the trade deal in and around there many five-gallon cans and one-gallon cans made for handling coal oil, and ten-gallon cans?

A. Yes, sir, there are plenty made.

Q. 295. Especially those dimensions?

A. Yes, sir; one, five and ten.

Q. 296. And if an order had been sent in for oil cans, they would have come to you, wouldn't they?

A. Yes, sir; they would have come to the Standard Oil Company. They sent nothing to me.

Q. 297. Everything you ordered, whatever it was, came?

A. Yes, sir; to the Standard Oil Company.

Q. 298. But I will ask you if, in the oil dealings there, isn't a good deal of oil sold in gallon cans and five-gallon cans, in those dimensions?

A. I never did sell very many.

Q. 299. Well, some?

A. I don't know as I ever sold but very few. I don't know that I have ever handled a gallon can—one-gallon can.

Q. 200. But the trade does?

A. Yes, sir; but I am not in the grocery business, and that is where most of the coal oil is handled.

Redirect examination.

By Mr. CATES, Attorney General:

Q. 301. You have been asked a good deal about what kind of an impression you had. I simply want to know whether or not Mr. Carrico said anything to you about any report—about not reporting that oil if you should give it away?

A. No, sir; didn't say anything at all to me about that.

Q. 302. Didn't say anything about not reporting it or reporting it?

A. No, sir.

Q. 303. You just supposed it would be reported, as usual?

A. Yes, sir.

Q. 304. And that he would adjust it?

A. That he would adjust it.

Q. 305. How far is it from here to Dover, Tennessee?

A. I don't know, sir.

172 Q. 306. I believe you said Mr. Carrico said order milke cans?

A. Order cans—he said cans—or milk cans, not the regular coal oil can like the wagon carries, but a different can.

Q. 307. You used the term milk can?

A. Yes, sir.

Q. 308. Were they going to give away the milk can and the oil, too?

A. I don't know about that.

Q. 309. I am talking about his proposition; didn't he give that; didn't he go any further than that?

A. He didn't say.

Further this deponent saith not.

O. T. REYNOLDS,

By Stenographer and Notary Public.

Witness claims attendance one day, and mileage from Dover, Tennessee, which is — miles from Nashville.

Deposition of Wm. M. Cassetty. Filed Nov. 14, 1907. J. G. D. Morton, C. & M. (Trans. Vol. 1, p. 447.)

Said witness, WM. M. CASSETTY, being first duly sworn, testified as follows:

Direct examination.

By Mr. CATES, Attorney General:

Q. 1. State your name, age, place of residence and occupation?

A. W. M. Cassetty, fifty-seven years of age, residence Nashville, and I am engaged in merchandising.

Q. 2. Are you connected in any way with the Cassetty Oil Company?

A. Yes, sir.

Q. 3. Are you a director in that concern?

A. Yes, sir.

Q. 4. How long have you been connected with the Cassetty Oil Company?

A. From its incipieny, excepting one year, in 1906. My connection was not active for two or three years prior to that.

Q. 5. I will ask you if you were the founder of the Cassetty Oil Company?

A. Yes, sir; I was.

173 Q. 6. How long has it been engaged in business here in Nashville?

A. Well, the business was started in 1884; the original business that was in my own name, W. M. Cassetty.

Q. 7. It is now a corporation, isn't it?

A. Yes, sir.

Q. 8. When was it incorporated?

A. My recollection is that it was in the spring of 1885—May, 1885, I think

Q. 9. I will ask you whether, in the latter part of the nineties, or 1900, or 1901, or prior to that time, there was competition here in Nashville in the sale of oils between the Cassetty Oil Company and the Standard Oil Company?

A. There was always an active competition, General.

Q. 10. I will ask you to state whether there was a contract entered into between the Cassetty Oil Company and the Standard Oil Company which terminated that competition, and, if so, whether it was in writing?

A. Yes, sir; there was such a contract executed.

Q. 11. Have you that contract with you?

A. I have.

Q. 12. Please produce it and file it as Exhibit "A" to your deposition?

A. I do so.

Q. 13. This contract seems to be dated the first day—I mean October 30, 1899; is that right?

A. Yes, sir.

Q. 14. I see it is executed on the part of the Standard Oil Company of Kentucky, by some one whose name I cannot very well make out. Can you tell us who that is? Is it McDonald or McDonally?

A. McDonald, President, I think; I read it that way. I am not familiar with that signature, but am with this one here.

Q. 15. Whose are you familiar with?

A. C. T. Collings.

Q. 16. He witnessed it?

A. Yes, sir.

Q. 17. Seems to be executed on behalf of the Cassetty Oil Company, by Mr. McIlwaine. Was he the President of the Company then?

A. No, sir; Vice-President.

Q. 18. Who is it witnessed by?

A. Venable Pitts.

Q. 19. Where was this executed?

A. We executed this in Nashville, I think. I am sure it was signed here; it was sent here for us to sign.

174 Q. 20. At the time this contract was entered into, what official connection did you have with the Cassetty Oil Company?

A. I was President.

Q. 21. Now, state in your own way what led up to the execution of this contract; what brought about this agreement between the Cassetty Oil Company and the Standard Oil Company?

A. As near as I can recall all of the facts, General, they were the result of a sharp contest, and it was not at all profitable, I don't suppose, to either one of us. It wasn't a very inviting proposition to us, to say the least, the condition that things had drifted into, and in negotiation with the representatives of the Standard Oil Company, looking to an adjustment of these affairs, this contract was the result of it.

Q. 22. The Standard Oil Company, in 1899, and for several years prior thereto, had an agency here in Nashville, did it not?

A. Yes, sir.

Q. 23. A fully equipped agency?

A. I so regarded it.

Q. 24. For the purpose of selling oil and the products of petroleum?

A. Yes, sir.

Q. 25. Now, before this contract was entered into, from whom did you buy oil?

A. We bought our goods almost entirely from independents; I don't recall that we purchased anything from the Standard Oil Company. We drew our supplies from independent sources.

Q. 26. And not from the Standard Oil Company at all, as you remember?

A. No, sir.

Q. 27. Were you dealing in oils and the products of petroleum which were being sold in competition with the oils and products of petroleum of the Standard Oil Company here in Nashville?

A. Yes, sir.

Q. 28. Now, was this contract and agreement lived up to for the period covered by it?

A. Yes, sir.

Q. 29. Were the sums provided for in this contract to be paid to the Cassetty Oil Company, paid to it by the Standard Oil Company?

A. Yes, sir.

Q. 30. Was this contract and agreement of October 30, 1899, renewed?

A. No, sir; it is the original contract, I recall now since I have reflected.

175 Q. 31. And was not renewed after its expiration, after the end of five years?

A. No, sir.

Q. 32. So, then, after the Cassetty Oil Company entered into this agreement which you have produced here, dated October 30, 1899, while it continued a business apparently as an independent company, it was really under the control of the Standard Oil Company; is that it?

A. As far as the carbon oil features indicates, it did. We drew our supplies of what is known as coal oil—that comes under the head of carbon oils—from them, under this agreement continuously, during the existence of this agreement.

Q. 33. And you took all your stocks of merchandise you sold, from the Standard Oil Company, under this agreement?

A. Nothing but the coal oils, that only covers, and has reference to the carbon oil features.

Q. 34. You had been known in the trade, up to 1899, as an independent oil dealer, in competition with the Standard Oil Company, hadn't you?

A. Yes, sir.

Q. 35. And you continued to be so known, notwithstanding this agreement?

A. Yes, sir; we didn't give any publicity to that agreement at all, so the same impression necessarily certainly must have prevailed.

Q. 36. Well, whatever kind of oil and other merchandise this contract covered you took from the Standard Oil Company, during the existence of this contract?

A. Yes, sir.

Q. 37. And reported to the Standard Oil Company your business, as provided in this contract?

A. Yes, sir; as provided in that contract, had a regular form.

Q. 38. What was the capitalization of the Cassetty Oil Company?

A. Well, the present capitalization is \$125,000.

Q. 39. What was it at that time?

A. I believe it was \$125,000 then. We got out an original charter with the privilege of \$100,000, our business gradually grew and absorbed that, and we had an amended charter of \$50,000 addition; that is my recollection.

Q. 40. I see in this contract it is provided, among other things, as follows:

"Should the total number of gallons of refined oil, and gasoline, handled by the party of the second part, exceed during any one year two hundred thousand (200,000) gallons, the party of the first part agrees to pay to the party of the second part one (1) 176 cent per gallon on such excess. The aforesaid payments to be made monthly, at the end of each month."

Did you sell above 200,000 gallons of oil?

A. No, sir.

Q. 41. So, you received no compensation on that score?

A. Well, if you understand the contract, we were to pay an advance there. I don't think we ever exceeded the limit; if we did, I have no recollection of it.

Q. 42. Further, I read from the contract, immediately preceding that part of it which is quoted in the question last above:

"In consideration of the foregoing, the said party of the first part agrees and binds itself, during the existence of this contract, to pay to the party of the second part the sum of three hundred and thirty-three (\$333.33) dollars and thirty-three cents per month, or at the rate of four thousand (\$4,000) dollars per annum; and in further consideration of the labor and expense connected with the handling of said refined oil and gasoline business, the party of the first part agrees to pay to the party of the second part, as compensation for such labor and expense, the additional sum of one hundred and sixty-six (\$166.66) dollars and sixty-six cents per month, or at the rate of two thousand (\$2,000) dollars per annum."

Was that six thousand dollars per annum so provided for, paid to the Cassetty Oil Company by the Standard Oil Company during the five years covered by this contract?

A. Yes, sir; I am sure it was, for the reason that I never heard anything to the contrary, and I will mention just a little additional feature that might explain my apparent knowledge of these things, that I had plenty to do, and left the detailed management under Mr. McIlwaine's supervision and Mr. McComb; that is, looking after these items of detail.

Q. 43. You have not seen this contract for some time, until this morning?

A. No, sir.

Q. 44. Until I procured it from Mr. McIlwaine there this morning?

A. It is the first time I have seen it, I believe, since its execution.

Q. 45. Had the competition between the Cassetty Oil Company and the Standard Oil Company, up to October 30, 1899, been mild, or had it been sharp?

A. It had been quite vigorous.

Q. 46. State whether or not up to that time the Cassetty Oil Company had lost money by reason of this competition and the management of the Standard Oil Company here?

177 A. We evidently lost the margin of profit that would have existed prior to any contest that arose, though the markets were changing; we just lost that.

Q. 47. Then the reason, as I understand you, of making and entering into this contract was to avoid competition between the two companies?

A. That was one of the conditions, General, and another condition was that the supply was rather limited; we could not procure it otherwise, satisfactorily.

Cross-examination.

By Mr. VERTREES, for Defendant:

Q. 48. Mr. Cassetty, you produced this contract this morning; where did you get it?

A. It was handed to me this morning.

Q. 49. By whom?

A. I just met Mr. McIlwaine and General Cates in conference out there.

Q. 50. By whom was it handed to you?

A. By General Cates?

Q. 51. Attorney-General Cates?

A. Yes, sir.

Q. 52. As I understood your answer to General Cates, with reference to this contract, if the Cassetty Oil Company soil oil in excess of two hundred thousand gallons a year, the Cassetty Oil Company had to pay the Standard Oil Company one cent a gallon on the excess?

A. That was my construction of it.

Q. 53. That was the way you understood this contract?

A. That is the way I understand it, yes.

Q. 54. Doesn't this contract say that the Standard Oil Company of Kentucky is the party of the first part, and the Cassetty Oil Company is the party of the second part?

A. Yes, sir.

Q. 55. Now, doesn't this contract provide expressly that should the total number of gallons of refined oil and gasoline, handled by the party of the second part, exceed during any one year 200,000 gallons, the party of the first part agrees to pay to the party of the second part one cent per gallon on such excess, the aforesaid payments to be made monthly at the end of each month?

A. Yes, sir; it so states that. I just had that in my mind, or recollection is a little bit at variance with that.

Q. 56. Have you had this contract in the meantime in your custody or possession?

A. My personal custody and possession; no, sir.

178 Q. 57. Have you ever seen it since?

A. I have no recollection of having seen it since its execution.

Q. 58. Were you present at its execution or wasn't it conducted the whole on the part of Mr. McIlwaine?

A. Yes, sir.

Q. 59. And your information was what he told you?

A. Yes, sir; but signed it at my office; I am sure of that.

Q. 60. Don't you know, as a fact, that he went to Louisville or

Cincinnati to see the officers of the Standard Oil Company, and that the contract was made at Cincinnati?

A. No, sir; I thought it was executed in Nashville.

Q. 61. I am not on where it was signed up?

A. I know he did make a visit there in this interest.

Q. 62. To bring about this contract?

A. Yes, sir; I presume that was his mission.

Q. 63. That he went for that purpose, there?

A. Yes, sir.

Q. 64. And wasn't it drawn up, the contract, by the Standard Oil people?

A. Yes, sir; I am inclined to think so; I don't know who drafted it.

Q. 65. And signed up there at Cincinnati?

A. I positively do not recall whether Mr. McIlwaine signed it there or in our office.

Q. 66. Really, do you know where it was executed, of your own knowledge?

A. My recollection is that he signed it in our office, but I would not be positive. I am not sure that the contract was. I am sure that the contract was executed and that Mr. McIlwaine's signature there is correct and his signature.

Q. 67. Now, does your signature appear anywhere on it?

A. No, sir.

Q. 68. Did you have anything to do with the negotiations looking to the contract?

A. No, sir; I only conferred with our end of it; we delegated that particular feature, as I expressed myself before, I delegated those to men that had charge of the details.

Q. 69. That was Mr. McIlwaine?

A. He was one of them.

Q. 70. Who was the other?

A. Mr. McCombs, we constituting the Executive Board.

Q. 71. Do you know where the contract was made?

A. I have just expressed myself on that.

Q. 72. Do it again, please?

A. I have no distinct recollection, but I believe it was signed at Nashville; if it was not, he was authorized to sign it.

179 Q. 73. You mean that the writing was signed up at Nashville by Mr. McIlwaine?

A. I don't make that as a positive assertion.

Q. 74. But that is what you mean if you mean anything, but you don't know where the contract was agreed upon or terms come to?

A. They originally made the proposition and we conferred about it in our office here at Nashville, and agreed to its acceptance.

Q. 75. Didn't Mr. McIlwaine go to Cincinnati and wasn't the contract made there, drawn up there and then forwarded down here for signatures?

A. We have just reiterated that in what we have previously stated.

Q. 76. I am asking you now if that was not the way it was?

A. I don't recall specifically the way the contract was minutely executed.

Q. 77. Isn't that your best recollection?

A. I cannot state anything more positively than I have already given.

Q. 78. At any rate, you will say it was all conducted by Mr. McIlwaine, you will say that?

A. He executed the document; the conferences on the provisions of the contract were passed on by our Executive Board, composed of Mr. McIlwaine, Mr. McCombs and myself.

Q. 79. You will say you were not present at any of the negotiations yourself?

A. You mean at Cincinnati?

Q. 80. Anywhere else, the negotiations with the Standard Oil people?

A. Not growing out of this transaction?

Q. 81. I mean the making of this contract, of course. You know I mean that.

A. Well, Mr. Vertrees, for the same reason I stated before, having delegated these specific details to men I felt capable of executing them, I didn't go into the particulars, and I do not recall whether it was the result of a conference—no, I am inclined to think it was different from that. We held a conference between the representatives of the Standard Oil Company, and Mr. McIlwaine and myself here in Nashville, originally, it seems, as near as I can recall, this was the final result, possibly.

Q. 82. Mr. McIlwaine knows where the contract was made, does he not?

A. I don't know whether he does or not.

Q. 83. Well, he ought to know?

A. Yes, if he executed it, he most certainly ought to know.

180 Q. 84. You were not called on to execute it or negotiate it, either?

A. I didn't finish it up; I know there was some conference passed between us; I don't remember whether it was the action that originated this contract.

Q. 85. Did the Casetty Oil Company delegate you to conduct the negotiation or to execute the contract?

A. Did it delegate me?

Q. 86. Yes, delegate you to do either, and if so, when and where?

A. I do not recall that it did.

Q. 87. Didn't it delegate Mr. McIlwaine to do that thing?

A. In executing this thing?

Q. 88. Yes, this contract is what we are talking about?

A. Yes, I believe it did.

Q. 89. Of course my questions are restricted to this contract?

A. Yes, sir.

Q. 90. Now, that oil, all the oil that you received under this contract was ordered from where?

A. From the Standard Oil Company.

Q. 91. Where?

A. I don't recollect; Cincinnati, I believe. Mr. McIlwaine was the buyer; he was our buyer.

Q. 92. Wasn't it all ordered from Cincinnati?

A. I don't know.

Q. 93. Isn't that your best recollection?

A. I have no recollection of it, because he was our buyer, and intrusted with that particular work.

Q. 94. You don't know how that was?

A. I don't know whether it was ordered from there or Louisville or Whiting or where.

Q. 95. It was ordered from other places?

A. It was ordered from other places than the station at Nashville, I am pretty certain.

Q. 96. Away from Nashville?

A. I think it was.

Q. 97. Either from Whiting, Indiana, or Louisville, or Cincinnati?

A. Yes, but under this contract we did buy some goods from them, from the Nashville station.

Q. 98. You can recollect that part, but you cannot recollect the other?

A. I know we would send down there and get things, and I am sure it applied to that.

181 Q. 99. Wasn't that incidentally a mere minor matter?

A. Yes, sir.

Q. 100. Wasn't the bulk of oil that was brought to you in tanks and that this contract called for, wasn't that gotten from other places?

A. Some other places.

Q. 101. All the time?

A. The bulk oil was, I think, as far as I can recollect.

Q. 102. Mr. McIlwaine knows how that was, or he ought to know; he was doing the buying and attending to it?

A. You will have an opportunity of ascertaining that later.

Q. 103. How do you know I will have an opportunity of knowing that later?

A. He was subpoenaed here.

Q. 104. How came the State of Tennessee to know what you know about this thing?

A. I have no knowledge; they presumed, or rather I presume, they knew we were in business, and we had some knowledge of that affair.

Q. 105. And that is the only way you know about it; that is your explanation of why they have you here as a witness?

A. I was invited by the Attorney-General to come up and disclose anything I knew about it.

Q. 106. Don't you know, as a matter of fact, the truth of that matter is this, that you yourself sat down and wrote a letter to the Attorney-General, asking him about this case at Gallatin, and how it was getting along; that that was the initial step?

A. I don't recall that that was the initial step, but I recollect writing such a letter, for information, and that letter was written at conference with Mr. Weakley, manager in our office.

Q. 107. You wrote the letter?

A. I wrote it as an individual and said we had been in this busi-

ness and was anxious to know something about it, for the reason if this case went as was indicated, we would likely have to make some other arrangement.

Q. 108. Don't you know that the truth was, after you wrote to the Attorney-General about the case, and the Attorney-General came to Nashville, and you told him about it?

A. No, sir.

Q. 109. And you told him voluntarily and gratuitously up at the Capitol?

A. No, sir; I never met him at the Capitol?

Q. 110. You met at the Tulane?

A. Yes, sir.

Q. 111. Didn't you just do that?

A. Oh, yes; I met him.

182 Q. 112. And didn't you tell him there was such a contract as this, and you didn't have it, but where he could get it, and how it was made, and isn't that the truth of the matter; that is the way this came about, instead of the way you stated it awhile ago?

A. I presume General Cates understands his business; I don't know what brought the information to General Cates; I know one thing, as a matter of business and protecting our own business, we suggested we go to work, investigate this subject and ascertain what the condition of that case was.

Q. 113. Who did you suggest it to?

A. Mr. Weakley, present manager and Vice-President.

Q. 114. Anybody else?

A. No, sir; nobody else for me there to confer with.

Q. 115. Nobody else in the company to confer with?

A. Not accessible to me without some hindrance.

Q. 116. But the point I want to get at—

A. I know the point you want to get at, but you are wrong in that.

Q. 117. What is it, then; you can tell me whether I am wrong?

A. You are.

Q. 118. Didn't you go to the Attorney-General, after writing him and receiving a communication, and voluntarily meet him at the Tulane Hotel and tell him these things?

A. I never met the General at the Tulane Hotel in Nashville before.

Q. 119. Before what?

A. Before this meeting?

Q. 120. Did you go any place and meet him and tell him these things?

A. I did, at his invitation.

Q. 121. Where?

A. At the Maxwell House, Nashville, Tennessee.

Q. 122. Then, the Maxwell House is the place?

A. And I presumed that was in the nature, he being a State official, in the nature of an official command to appear before him, as I regarded it as that.

Q. 123. Have you got his letter?

A. I have it in my files.

Q. 124. And you state you understood it in the nature of an official command?

A. I regarded it; I may have been a little bit — error in that; I am not as thoroughly familiar with these court proceedings as you are.

Q. 125. Don't you know that it was nothing more than a polite request to meet him at the hotel for the purpose of a conference?
183 A. No, I did not entirely regard it as that, but as a part of his official duty.

Q. 126. Will you produce that letter?

A. I haven't it with me.

Q. 127. Will you produce that letter then?

A. If I have it; yes, sir.

Q. 128. That letter, acknowledging receipt of your letter, which was the first one, and requesting you to meet him. Isn't there such a letter in existence?

A. Yes, sir; I think there is.

Q. 129. You will file it with your deposition?

A. Yes, sir.

Q. 130. You say the competition up to the making of this contract had been pretty severe?

A. We have had a vigorous competition. The opposition has always been active and very vigorous in competition.

Q. 131. My question was, if the competition up to the making of this contract of October 30, 1899, was not severe and active, if you please?

A. It may suggest itself to your mind as a theoretical question——

Q. 132. I don't want that theoretical question. I want you to answer the question, and then you can do all the arguing you want to?

A. What was your question?

Q. 133. Whether the competition, up to the making of this contract, was active or not?

A. My recollection is at that time it was.

Q. 134. Now you can make your explanation?

A. I say, it may appear to you gentlemen a little singular that I cannot recall the details of all the facts as they absolutely occurred, but I have stated before I gave out the details to be looked after by others, and presumed they would be carefully looked after. At one period of our business we were doing quite an active coal oil business in Nashville; the prices were lowered very considerable, as far as I recall, from about 14 cents down to 10 cents, and the contest continued for about three months; I am not positive, but I am inclined to think that this contract is the result of an adjustment of that sharp competition.

Q. 135. Very well; now I understand that. Did the competition continue after the making of this contract or not?

A. No, sir.

Q. 136. It ceased?

A. It wasn't quite so active.

Q. 137. Was it active at all?

184 A. As I stated before, they have always been vigorously active in their competition, but in this particular line, there was no special activity.

Q. 138. But was there active competition or was there competition?

A. I don't recall specifically whether there was or not, excepting I know they are always alert in these matters.

Q. 139. I am especially now on the conduct of the Cassetty Oil Company, after this contract, did you all continue to sell oil, apparently in competition to the Standard?

A. Yes, sir; apparently so.

Q. 140. Did you really compete with them in the market?

A. We were not quite so vigorous.

Q. 141. I am not on that point. You stated awhile ago, before the contract was made, there were three months of absolute destructive competition?

A. That is, as far as I recollect.

Q. 142. But you did recollect that awhile ago, and volunteered it as an explanation?

A. I certainly did.

Q. 143. And prior to that time you say it had been extremely active, the competition while not so bad as through those three months, but bad enough; is that a correct statement of the facts?

A. As far as I can remember them, yes.

Q. 144. Now, after this contract was made, isn't it true that the Cassetty Oil Company held itself out as an independent oil company in the community?

A. Yes, sir.

Q. 145. Now, in point of fact, did it compete at all with the Standard Oil Company? Did it make competitive prices and did it compete with it in business; I don't mean was it as active as before, but was there competition?

A. Your question is not specific enough; we were active in our business, but were not active in this department this contract covered.

Q. 146. Active in the competition with oil?

A. It was not our ambition to press it as hard as previously.

Q. 147. Did you push it at all?

A. Yes, sir.

Q. 148. Did you try to sell oil?

A. We didn't try to sell any more than——

Q. 149. You were afraid to sell over two hundred thousand gallons?

A. We didn't want to go over the limit.

Q. 150. As you understood that, you had to pay them if you went over the limit, one cent a gallon?

185 A. That was my construction, but I had forgotten the features of it.

Q. 151. Did you represent to the public that you were independent?

A. Not more than we ordinarily had done.

Q. 152. Hadn't you before that ordinarily and extraordinarily held yourselves out as competitors and actively so?

A. Not extraordinarily.

Q. 153. Did you tell the truth, generally then, about your situation with the Standard Oil Company during the four years?

A. What four years?

Q. 154. Five years. The five years this contract was in operation?

A. We were independent as far as our general business went, but not on the coal oil.

Q. 155. Did you represent to the public you were independent on the coal oil features?

A. I don't know that we did, vigorously for that; we had to necessarily keep within the bounds of that contract.

Q. 156. Was it commonly understood that you were, in that respect, as far as oil was concerned, representing the Standard Oil Company and dealing as their agent?

A. No, sir.

Q. 157. Did you conceal that fact?

A. We didn't disclose it.

Q. 158. Did you conceal it?

A. I don't know that we unnecessarily disclosed it.

Q. 159. I am not on the unnecessary part of it; did you try to keep it from the public?

A. We tried to attend to our business, you know.

Q. 160. But that does not answer my question. You know what I mean?

A. I don't think there was any organized or specific effort to keep that feature down, particularly as I recall.

Q. 161. Was it commonly known?

A. We have been regarded as a branch of the Standard Oil ever since we have been in business.

Q. 162. And during that time, were not you particularly regarded as a branch of the Standard Oil Company?

A. Not any more so than we previously had been.

Q. 163. Had you previously been?

A. I don't know what interpretation the public placed upon our relaxation of efforts.

Q. 164. At any rate, you were regarded as a branch of the Standard Oil business?

186 A. They believed we were, but we were specifically independent up to the execution of this contract; absolutely so.

Q. 165. Now isn't this true, that up to the time of the making of this contract with the Cassetty Oil Company, that the Cassetty Oil Company had not been in point of fact, buying its oil from the Standard Oil Company?

A. That is my impression; yes, sir.

Q. 166. Well, you know, don't you?

A. Mr. McIlwaine was the buyer, and I don't know who he bought from; that was his business, specifically.

Q. 167. Do you mean to tell us you don't know whether it was gotten from the Standard Oil Company or not?

A. Which, during this contract?

Q. 168. No, prior to this contract?

A. I am sure it was not.

Q. 169. Now, in point of fact, hadn't it about gotten to the point you were having great difficulty in getting any supply of oil at all?

A. Only in the coal oil line.

Q. 170. I mean in the coal oil line?

A. Yes, sir.

Q. 171. You had trouble getting supplies?

A. Yes, sir.

Q. 172. And your trade had diminished; your trade in oil?

A. We had to relax our efforts, because we could not see available supplies ahead of us to justify.

Q. 173. It had gotten to where you could not see where you would get it?

A. It was very difficult.

Q. 174. Isn't that the truth of the matter?

A. It was very difficult to get it.

Q. 175. And the volume of your trade in that respect was diminishing?

A. Well, now, I just presume that it was, but those facts I am not conversant with. I tried to impress upon you my position in our business was such that the details in the office were looked after more by the men in the office all the time; mine was more outside work. I thought I had responsible men there and entrusted them with it.

Q. 176. Now, after you got this contract to handle the oils of the Standard Oil Company, then you bought your oil from them, or rather you handled their oils?

A. We bought the coal oils from them.

Q. 177. And did you get your coal oil from anybody else?

A. Upon that contract?

Q. 178. Yes.

187 A. No, sir, I don't think we did; tried to be faithful to our contract.

Q. 179. Does this relate to anything else than coal oils?

A. No, sir, not that I recall.

Q. 180. Well, did your people make an effort to have it renewed when it expired, the Cassetty Oil Company?

A. I think they did.

Q. 181. And didn't the Standard Oil Company refuse?

A. Yes, sir; that is my recollection.

Q. 182. The Cassetty Oil Company had continued in business here all the time?

A. Yes, sir.

Q. 183. Have they any relations with the Standard Oil Company now?

A. No contract arrangement; buy some goods from them occasionally.

Q. 184. From whom does the Cassetty Oil Company buy its goods?

A. Well, from various and sundry parties, sir; some of the supposed independent dealers and some from the Standard Oil Company.

Q. 185. We will go back to your relations with the Cassetty Oil Company. You say you were the principal man in bringing out that business. You had a business and it was incorporated?

A. Yes, sir.

Q. 186. You were made President?

A. Yes, sir.

Q. 187. And stayed President for some time?

A. Yes, sir.

Q. 188. You are not the President now?

A. No, sir.

Q. 189. When were you deposed?

A. I think it was in 1903, if I recollect.

Q. 190. Who succeeded you?

A. Mr. Mellwaine.

Q. 191. Is he the President?

A. Yes, sir.

Q. 192. And has been ever since?

A. Yes, sir.

Q. 193. Why were you deposed as President?

A. You are asking me a very complex question; I don't know.

Q. 194. Was there any trouble in any way?

A. Well, there was a faction that grew up in our company, or friction, rather, and it drifted into factions, and it resulted in a change.

188 Q. 195. Was there any trouble about your management; did you owe them anything or do you owe them anything?

A. Yes, sir; and they owe me, too.

Q. 196. How much do you owe them?

A. Is that pertinent?

By Gen. CATES, Attorney-General:

I don't think it is pertinent.

A. I thought he was getting out of his latitude.

By Mr. VERTREES, for Defendant:-

Q. 197. Mr. Cassetty, you are a witness and have put yourself up here, you know, as a witness in this case?

A. No, I was regularly summoned.

Q. 198. But we have already shown how?

A. You suppose you have. I am at variance now with the management, and have been for some time; and it is the case of many investigations you have had to go into, because of friction in businesses.

Q. 199. The point I am on is this, were you at the time you were deposed as president, indebted to the company?

A. Well, I refuse to answer that question.

Q. 200. I will ask you if you have paid that indebtedness, if you were?

A. I refuse to answer that question.

Q. 201. Have you any interest in the stock of the company?

A. Yes, some little.

Q. 202. How much?

A. I suppose my holdings now would amount to about twelve thousand dollars.

Q. 203. Is it encumbered or hypothecated for its full value?

A. That is my private business,

Q. 204. What I want to get at, in reality, have you any monetary interest in the company when that stock is cleaned up and what is on it?

A. That remains to see if the wreckers will leave enough there for us to realize on.

Q. 205. Who are the wreckers, Mr. Cassetty?

A. Will you allow me to make a correction there, Mr. Vertrees?

Q. 206. To be sure.

A. I say wreckers, the movers in those antagonistic measures; I don't like to use such a hard term as that.

Q. 207. You refer to the factions in the company?

A. Yes, those are common things that exist in companies, and I am very sorry to have been in one of them.

Q. 208. Do you owe the Standard Oil Company anything?

A. I refuse to answer that question.

189 Q. 209. Isn't it a fact that you do owe them money for oil you got and never paid them for?

A. I refuse to answer that question.

Q. 210. Well, you will answer this question, then; did you ever sell over two hundred thousand gallons of oil per annum during the time this contract was in force?

A. I do not recollect.

Q. 211. Well, were you present when application was made at the termination of this contract, to renew it? Were you present; do you know what happened?

A. Yes, I recollect we did make some effort to have it renewed.

Q. 212. Were you present?

A. Present where; in Nashville?

Q. 213. At the interview?

A. In Nashville?

Q. 214. Anywhere?

A. In our office, yes.

Q. 215. Who was it between?

A. Mr. McIlwaine, Mr. McComb and me.

Q. 216. That is your side; you didn't understand me. Were you present when occurred what passed between your people and the Standard Oil Company?

A. No, sir.

Q. 217. When you say that, you mean you all agreed in your camp that you would make an effort to renew it?

A. Yes, sir; if we could.

Q. 218. Do you know what passed between your representative and Standard Oil Company, in that respect of your own knowledge?

A. That didn't come under my observation.

Q. 219. Do you know who did that?

A. Mr. McIlwaine, of course; we expected him to attend to it; it was in his charge and one of the delegated responsibilities that directly belonged to him; I didn't interfere with him at all.

Q. 220. Mr. Venable Pitts' name is signed there; I suppose that is as a witness?

A. Yes, sir; what it says, as a witness.

Q. 221. But, in point of fact, he didn't make the contracts of the company?

A. No, sir.

Q. 222. What is his position?

A. He has been bookkeeper continuously for a number of years, and for that reason I am inclined to believe the contract was signed in our office and he witnessed it.

Q. 223. You mean, as far as Mr. McIlwaine's signature is concerned?

A. Yes, sir.

190 Q. 224. You don't know where it was signed by Mr. McDonald and Mr. Collings?

A. No, sir.

Q. 225. They don't live in Nashville?

A. They did not at that time.

Q. 226. Do they now?

A. No, sir; I don't know where they live.

Q. 227. Are you acquainted with them?

A. I know Mr. Collings.

Q. 228. You don't know Mr. McDonald?

A. No, sir.

Q. 229. What is your present connection with the company?

A. I just have a sales connection, in the sales department, and I am one of the directors.

Q. 230. You are a director of the company?

A. Yes, sir.

Q. 231. But you hold no official position?

A. No, sir.

Q. 232. But you are a salesman?

A. Yes, sir.

Q. 233. City salesman?

A. I go anywhere.

Q. 234. Are you on a salary or commission?

A. On a salary.

Q. 235. You are a salaried salesman?

A. Yes, sir.

Redirect examination.

By Mr. CATES, Attorney-General:

Q. 236. Now, Mr. Cassetty, the substance of your answers to Mr. Vertrees' questions are, as I understand it, that you do not know where Mr. Collings actually signed that paper?

A. I do not.

Q. 237. At a witness?

A. I do not.

Q. 238. And do you know in whose office the paper was actually written?

A. I don't know it positively; no, sir.

Q. 239. Now, before that contract was executed, had Mr. Collings been down to see you gentlemen who were officers of the Cassetty Oil Company?

A. Before that?

Q. 240. Yes, before the contract was executed?

A. I don't recollect now, Mr. Cates, whether it was Mr. 191 Collings or not; there were two gentlemen down here to see us at a time prior to the signing of the contract.

Q. 241. You don't know whether one was Mr. Collings or not?

A. I don't know who the second man was. I know that he was an attorney like, but I do not recall his name, but it was not Mr. Collings, this man I have in my mind.

Q. 242. This second man?

A. Yes, sir.

Q. 243. But two officers of the Standard Oil Company did come down and confer with you about settlement of the fight on between the Cassetty Oil Company and the Standard Oil Company?

A. Yes, that is my recollection.

Q. 244. I understood you to say in response to one of Mr. Ver-trees' questions that the Standard Oil Company officials made you a proposition, and then you and Mr. McIlwaine and Mr. McComb consulted about it, agreed to accept it, and you sent Mr. McIlwaine to Cincinnati to see the Standard Oil people. Is that right?

A. To negotiate the matter, yes, sir; close it up.

Q. 245. To conclude the negotiations?

A. Yes, sir.

Q. 246. Now, as I understood you to say, prior to the execution of the contract, the Cassetty Oil Company was absolutely independent of the Standard Oil Company?

A. Well, there was no obligation of any character that existed between us at that time.

Q. 247. And you were holding yourselves out as independent dealers to the public generally?

A. Yes, sir.

Q. 248. Now, you said, after the execution of the contract, "they supposed we were a branch of the Standard Oil Company." What do you mean by "they supposed?"

A. The public generally.

Q. 249. Do you know that to be a fact?

A. I have been asked several times if, during the time of our business, we were not a part and branch of the Standard Oil Company.

Q. 250. Those were the inquiries directed to you?

A. Yes, sir.

Q. 251. But, you say, you did not disclose this relation created by the contract to the public?

A. No, sir.

Q. 252. And you did not disclose it to these inquiring parties, did you?

A. No, sir; not promiscuously.

Q. 253. Now, as a matter of fact, in regard to the matters covered by that contract, after its execution, there was absolutely no competition between the Standard Oil Company and the Cas-

192 setty Oil Company, after the execution of that contract?

A. In coal oils there was not.

Q. 254. The contract says what that covers?

A. I want that specifically covered, because there are different branches.

Q. 255. We will assume that the contract says what it covers?

A. Yes, sir.

Q. 256. Now, in regard to the matters covered by that contract, there was absolutely no competition between the Standard Oil Company and the Cassetty Oil Company?

A. It wasn't as vigorous; we kept up our connection, as far as it was profitable for us to do it.

Q. 257. And endeavored to hold out yourselves to the public as independent dealers, too, didn't you, after the execution of this contract?

A. Well, we didn't deny the fact, because we were really independent in a measure. Just one of those private agreements.

Q. 258. In regard to all the merchandise covered by this contract, you took that from the Standard Oil Company?

A. Yes, sir.

Q. 259. And at prices fixed by the Standard Oil Company?

A. Yes, sir.

Q. 260. Now, in regard to those matters, there was not any competition between the Cassetty Oil Company and the Standard Oil Company after the execution of this contract?

A. No, sir; I don't think there was.

Q. 261. You have been asked about a letter that you wrote to the Attorney General, and his reply to it, and you have stated that you would produce them if you could find them. Do you remember whether you kept a copy of the letter you wrote to the Attorney General?

A. I don't recall, but I am inclined to think I did.

Q. 262. Then, of course, if you produce it, it will show for itself?

A. Yes, I have a copy of it.

Q. 263. Do you know whether or not it referred to more than an inquiry as to the condition of the lawsuit over at Gallatin, Tennessee?

A. It specifically stated that, and nothing else.

Q. 264. Now, in regard to the Attorney General's reply; if you can find it, of course, it will show; but do you recall whether or not the Attorney General didn't take the matter up with you and inquire as to the trade relations between the Cassetty Oil Company and the Standard Oil Company?

193 A. Yes, sir; you did. Will you permit me to make a little explanation there.

Q. 265. You can make any explanation you please.

A. I will do that, just to square myself. Men are sometimes misunderstood. I had conferences in our office with the designated manager, relative to making this inquiry, and I suggested this might prove of vital interest to us, and we had better be making our arrangements to do something, and I tried to ascertain that information without approaching you, but I finally concluded that I would have to write you a direct communication to obtain the facts; then, as you say, it led to this general conference about our relations and you informed me at that time that you anticipated having us to appear before you, and others, in connection with your business, that my visit had precipitated my particular call.

Q. 266. What was the name of the manager you have referred to?

A. Mr. Charles H. Weakley.

Further this deponent saith not.

WM. M. CASSETTY,

By Stenographer and Notary Public.

Filed November 14, 1907. J. D. G. Morton, C. & M. (Trans., Vol. 1, p. 501.)

EXHIBIT "A" TO DEPOSITION OF WM. M. CASSETTY.

Memorandum of agreement, entered into this the 30th day of October, A. D. 1899, by and between the Standard Oil Company of Kentucky, incorporated, party of the first part, and the Cassetty Oil Company, incorporated, party of the second part, the said Cassetty Oil Company, being located at Nashville, Tennessee.

Witnesseth, That the above parties hereby enter into the following agreement, this agreement to continue for a period of five years from November 1st, 1899, and to terminate October 31st, 1904.

For and in consideration of the conditions hereinafter named, the said party of the second part does hereby sell, convey and assign to the said party of the first part, for the period covered by this agreement, all interest in the results or profits in the refined oil or gasoline business owned, controlled and operated by the said party of the second part.

The party of the second part hereby agrees and binds itself to conduct the said refined oil and gasoline business in its own name as heretofore, giving the business such time and attention
194 as required, utilizing all employes in the handling of the business as it has heretofore been handled, and in all particulars to give the business the same attention as if it were still being conducted in the interest of said second party; the party of the second part further agrees to be governed by and to follow in all particulars the directions of the party of the first part, in the handling and marketing of said refined oil and gasoline during the existence of this contract.

It is also agreed and understood that the party of the second part is to furnish the entire equipment requisite for handling the said refined oil and gasoline business, such as requisite storage tanks,

warehouses and storage room, and all requisite facilities and appliances connected with the preparation and filling of barrels and other packages with said refined oil and gasoline; such storage tanks and warehouse buildings to be of good and sufficient character for the proper protection of the goods, wares and merchandise belonging to the party of the first part used in the handling of said refined oil and gasoline business; the party of the second part binds itself to in every way protect and care for the said stocks and merchandise, and to be accountable for same, excepting the case of loss by fire or other causes or calamity, against which reasonable precaution on their part could not have prevented.

The party of the first part is to furnish the party of the second part all such stocks of refined oil and gasoline, empty barrels, glue, paint, bungs, etc., as may be required for the handling of said refined oil and gasoline business; all such oils are to be consigned to the party of the second part in tank cars, they to receive same and properly unload all such tank cars on arrival. It is understood, however, a change in the method of supply of refined oils or gasoline may be made, by mutual agreement of the parties hereto, to meet any exigencies that may arise.

The party of the second part agrees and binds itself to furnish all the requisite labor necessary in the handling of said refined oil and gasoline business, cooperage of barrels or packages, preparation and filling of same, draying and delivering, receiving and unloading refined oils or gasoline, and to furnish all clerical help requisite for the keeping of accounts, necessary office room, account books, stationery, etc., used in the conduct of said refined oil and gasoline business; also to furnish the requisite salesmen for the selling and marketing of said refined oils and gasoline, without expense or cost to the party of the first part, except as hereinafter named.

The party of the second part further agrees and binds itself to furnish to the party of the first part monthly reports of sales of all refined oils and gasoline sold by said second party, and also stocks on hand, and any other reports deemed necessary to intelligently follow the business; and the said party of the second part
195 binds itself to pay in cash, by the end of each month, for all sales made during the previous month, it being understood and agreed that the said party of the second part guarantees all sales made by it.

The party of the second part further agrees and binds itself to aid and assist in every way possible the development of the refined oil and gasoline business, and to give its support and co-operation towards further- the general interest of the party of the first part.

In consideration of the foregoing, the said party of the first part agrees and binds itself, during the existence of this contract, to pay to the party of the second part the sum of three hundred and thirty-three (\$333.33) dollars and thirty-three cents per month, or at the rate of four thousand (\$4,000.00) dollars per annum; and, in further consideration of the labor and expense connected with the handling of said refined oil and gasoline business, the party of the first part agrees to pay to the party of the second part, as compensation

for such labor and expense, the additional sum of one hundred and sixty-six (\$166.66) dollars and sixty-six cents per month, or at the rate of two thousand (\$2,000) dollars per annum. Should the total number of gallons of refined oil and gasoline handled by the party of the second part exceed during any one year two hundred thousand (200,000) gallons, the party of the first part agrees to pay to the party of the second part one (1) cent per gallon on such excess. The aforesaid payments to be made monthly, at the end of each month.

Witness the signatures of the parties hereto, this the 30th day of October, A. D. 1899.

STANDARD OIL COMPANY OF KENTUCKY;
By ALEX. McDONALD, *Pt.*

Witness:

C. T. COLLINGS.

CASSETTY OIL COMPANY,
By JAMES R. McILWAINE, *V. P.*

Witness:

VENABLE PITTS.

Filed November 14, 1907. J. D. G. Morton, C. & M. (Trans.,
Vol. 1, p. 508.)

EXHIBIT "B" TO DEPOSITION OF WM. M. CASSETTY.

NASHVILLE, TENN., *May 5, 1907.*

Hon. C. T. Cates, Jackson, Tenn.

DEAR SIR: I write to ascertain the status of the case of the State *vs.* Standard Oil Company. We are strictly manufacturers and dealers at this place, of long years' standing, and this inquiry is no idle curiosity with us, but we want to keep in touch, as far as possible, with the situation, and govern ourselves accordingly.

196 I refer you to Judges McAlister and Neal as to my reliability. With best wishes, I beg to remain,

Yours very truly,

W. M. CASSETTY.

EXHIBIT "C" TO DEPOSITION OF WM. M. CASSETTY.

Filed November 14, 1907.

JACKSON, TENN., *May 11, 1907.*

Mr. W. M. Cassetty, Nashville, Tenn.

MY DEAR SIR: Replying to your inquiry of the 9th inst., I beg to advise you that the case of the State against the Standard Oil Company is pending in the Chancery Court of Sumner County, upon a demurrer interposed by the oil company. The hearing on this demurrer will take place on Tuesday next, when, if it is overruled, the company will be required to answer.

I will be very glad to have any information relative to the doings of the Standard Oil Company, or any other matter, which may throw light upon the case now pending, and will be obliged to you therefore.

Yours very truly,

C. T. CATES, JR.,
Attorney General.

*Deposition of James R. McIlwaine. Filed November 14, 1907.
(Trans., Vol. 1, p. 511.)*

JAMES R. MCLWAIN, called on behalf of complainant, being first duly sworn, deposed as follows:

Direct examination.

By Mr. CATES, Attorney General:

Q. 1. State your name, age, place of residences and occupation?

A. James R. McIlwaine; residence, Nashville, age, forty-eight years; I am in the oil, soap and axle grease and lumber business.

Q. 2. What connection have you with the Cassetty Oil Company?

A. President of the Cassetty Oil Company at present, sir.

Q. 3. You came here to testify under subpoena?

A. Yes, sir.

Q. 4. Directing you to bring with you your contract or your copy of the contract between the Standard Oil Company and the Cassetty Oil Company?

A. Yes, sir.

197 Q. 5. You brought that contract with you?

A. Yes, sir.

Q. 6. And before Mr. William M. Cassetty was examined you handed the contract to Attorney General Cates, did you not?

A. Yes, sir.

Q. 7. Now, he had never seen that contract before?

A. The Attorney-General?

Q. 8. Yes.

A. No, sir.

Q. 9. I show you the paper which you handed to the Attorney General, and which purports to be executed by the Standard Oil Company and the Cassetty Oil Company, and which has been filed as an exhibit to the deposition of Mr. William M. Cassetty, and will ask you to state if you executed that paper on the part of the Cassetty Oil Company?

A. Yes, sir.

Q. 10. Who executed it on the part of the Standard Oil Company?

A. Alexander McDonald, it seems there.

Q. 11. Who is this that witnessed Mr. McDonald's signature?

A. C. T. Collings.

Q. 12. Who witnessed your signature?

A. Mr. Pitts, our bookkeeper. He was a director, also, at that time, as well as I remember.

Q. 13. Where was this contract signed by you?

A. It was signed—I assume it was signed—here, from Mr. Pitts being the witness, but I could not say for sure it was not signed in Cincinnati. It is eight years ago, and I could not say as to that, but I have always, for twenty years, I guess, looked after the buying and selling of our produce, and I went to Cincinnati and made these negotiations, and brought everything up to the shape it is in now, and before signing it myself, I presume that I must have signed it here in Nashville, though I cannot say positively about it; but, naturally, I would not deliver a contract of that kind to the Standard Oil Company, or anybody else, without first going into all the details and getting permission or authority to do so from my associates?

Q. 14. Mr. Venable Pitts didn't go to Cincinnati with you?

A. No, sir.

Q. 15. And so far as his witnessing the contract is involved, that was done here?

A. Yes, sir; I don't know that he was ever in Cincinnati.

Q. 16. And you assume, therefore, that you actually signed the paper here, for that reason?

A. I judge that must be the way it was done.

198 Q. 17. Now, this matter had been under consideration between the Standard Oil Company officials and the officials of the Casetty Oil Company some little time before the contract was prepared, had it not?

A. My memory don't go back that far. I know I was mighty anxious to make a deal with them, and I do not suppose it hung fire any longer than was necessary.

Q. 18. You were anxious to make a deal to stop competition between your company and the Standard Oil Company?

A. No, sir; that wasn't the situation at that time, General. Previous to the signing of that contract, for six or seven years, a man named Miller, operating as the Miller Oil Company, whose father was in the refining business in Pittsburg, Pa., had all kinds of backing. He came down here and started into business, and, previous to his coming here, the Standard Oil Company and ourselves had been pretty active, or we were doing quite an oil business, and we had also gone into the soap business; we had for fifteen years been in the lubricating oil business and axle grease business. We have no refineries behind us; we simply bought and sold this commodity as any other, and when the fight came on between Miller and them, he had the refinery behind him and the Standard Oil Company, and why our business on burning oils dried up, practically. We could not see any profit, and every barrel we sold we had to replace with another, so we paid attention particularly to lubricating oils, axle grease and soap, and during those years built up a splendid soap business. After they bought Miller out; I think that is the way, but I know he folded his tents and left here, and I think they all—I am sure that they bought his ground, and he had nothing down there but a lot of old worn-out stock and tanks. He had been through a pretty good sweating, I think, and when he left here we had mighty

little coal oil trade—very little—while we were using all the capital we had in our soap and axle grease business, and we did not care about getting in any great big rookus on coal oil if we could keep out of it; but, at the same time, it was part of our business, and we felt if prices got back to a point where there was a profit in it, naturally, we would be looking around for some of it, and at that time this question came up about buying our coal oil business, and I figured I made a mighty good sale to the Standard Oil Company when I got that, and Mr. Cassetty and Mr. McCombs were delighted with it, for they knew just about what we had been doing previous years, and they knew it took a lot of money to do business, and we didn't have the money, and I think now we made a good trade, and I went to St. Louis at the time that was ended, believing I could get an extension of it, and did my level best, but I could not make it.

Q. 19. Now, you say that Mr. Miller, of Pittsburg, opened up an oil business in this territory?

199 A. Yes, sir.

Q. 20. So that there were operating in this territory the Mr. Miller, of Pittsburg, with a refinery back of him?

A. Yes, sir.

Q. 21. And the Standard Oil Company, with a refinery back of it?

A. Yes, sir.

Q. 22. And the Cassetty Oil Company, which was an independent dealer, but had no refinery back of it?

A. Yes, sir.

Q. 23. Direct competition between these three companies got pretty sharp?

A. Yes, sir; so sharp that we let our coal oil business rock along; could not see any profit in selling it.

Q. 24. So the Standard Oil Company bought Miller, or it got him out of this territory?

A. He got out. I don't know about the details.

Q. 25. Didn't you say the Standard Oil Company bought out his plant down there?

A. He didn't have a plant, except a lot——

Q. 26. The place where he did business?

A. Yes, sir.

Q. 27. Don't you know it bought out Miller's refinery, too?

A. No, sir.

Q. 28. Didn't they tell you that during your negotiations with them at Cincinnati?

A. No, sir.

Q. 29. Didn't Mr. Collings tell you that?

A. No, sir.

Q. 30. Didn't that information come to you in any way?

A. Never has; I don't know it to this day.

Q. 31. Then, the result of that trade conflict here between Miller and the Standard Oil Company and the Cassetty Oil Company, at the end of it, the Cassetty Oil Company had mighty little coal oil left, is that what you say?

A. Yes, sir.

Q. 32. Then, it seemed a good business arrangement to you and Mr. Cassetty and Mr. McComb to enter into this contract?

A. Yes, sir.

Q. 33. And you did enter into it?

A. Yes, sir.

Q. 34. And observed its terms during the five years covered by it?

A. I don't know that we observed the terms as they expected us to observe them, but we observed the terms as we intended to observe them.

200 Q. 35. As you construed it?

A. Yes, sir. I knew that it would cost us money to sell every barrel of oil; it would cost us that much money. I didn't propose to get busy selling oil when I was paid a certain amount of money per month whether I sold it or not.

Q. 36. Mr. McIlwaine, up to the time this contract was entered into, you had held yourselves out as independent coal oil dealers, hadn't you?

A. Yes, sir.

Q. 37. And you continued to hold yourselves out as independent coal oil dealers to the trade generally?

A. I don't remember that we quoted coal oil to anybody—sent out quotations—and I know our traveling men were not allowed to sell coal oil.

Q. 38. Was the fact of this agreement, was the effect of it, to stop you from dealing in coal oil?

A. I don't know what their intention was. I know that after we got a promise of that amount of money, I got pretty careless about whether I sold any coal oil or not.

Q. 39. Then, you didn't try to sell any coal oil?

A. No, sir.

Q. 40. I see in the third paragraph of this agreement the following:

"For and in consideration of the conditions hereinafter named, the said party of the second part does hereby sell, convey and assign to the said party of the first part, for the period covered by this agreement, all interest in the results or profits in the refined oil or gasoline business owned, controlled and operated by the said party of the second part."

I have read from that correctly, haven't I?

A. I think so; that is my recollection of it.

Q. 41. Then, the fourth and fifth paragraphs seem to refer to agreements upon the part of the party of the second part, and then, the sixth paragraph is as follows:

"The party of the first part"—which, from the agreement, seems to be the Standard Oil Company—"is to furnish the party of the second part all such stocks of refined oil and gasoline, empty barrels, glue, paint, bungs, etc., as may be required for the handling of said refined oil and gasoline business; all such oils are to be consigned to the party of the second part in tank cars, they to receive same and promptly unload all such tank cars on arrival. It is understood, however, a change in the method of supply of refined oils

or gasoline may be made, by mutual agreement of the parties hereto, to meet any exigencies that may arise."

Now, under that, they were to furnish you all the refined oil and gasoline that you might need in your business?

201 A. Yes, sir.

Q. 42. It was that kind of oil that you kind of stopped selling?

A. Yes, sir.

Q. 43. And in consideration of all of that, they agreed to pay you practically five hundred dollars per month?

A. Yes, sir.

Q. 44. Did they pay you that five hundred dollars per month during the pendency of this agreement, during the life of the agreement, or the time that it ran?

A. Yes, sir.

Q. 45. And it was that relation which you sought to renew at the expiration of this contract?

A. Yes, sir; I was satisfied with it.

Q. 46. And you were so satisfied with it that you had just quit trying to sell refined oil and gasoline?

A. We were using our money profitably in other lines of business, always borrowed up, and naturally would not go and put money in a line of business that wasn't showing any profit.

Q. 47. Now, answer my question. Had you practically quit selling, under the terms of this agreement, refined oils and gasoline?

A. Well, we were selling, I suppose, something like fifty to seventy-five barrels a month.

Q. 48. But nothing like your business before this agreement was entered into?

A. About the same that we were doing before, when Miller came here.

Q. 49. But before that?

A. Oh, no; it would have taken us two or three years—as far as that is concerned, we never could have worked up to that point.

Q. 50. Wait a minute. How do you know you could not have worked up your trade relations after Miller was out of the territory, to the volume of the trade you had before?

A. For the reason that during that time the Standard Oil Company had adopted distributing tank stations in every town of importance in this section of the country, and had put on tank wagons driving out to the different places on all the different pikes, and just simply absorbed the business.

Q. 51. Then, if you could not do any kind of business, what was their reason for wanting you to cease the sale of gasoline and refined oil?

A. I never stopped to figure out what they were after. I was looking after the interests of our stockholders in getting a trade through with them.

Q. 52. That was virtually what you intended it to mean, that you were not to push sales of refined oil and gasoline?

202 A. That contract didn't say it, I don't think.

Q. 53. You didn't do it after this contract was entered into?

A. No, sir.

Q. 54. And you considered the five hundred dollars per month they were to pay you would be more than the profits you made if you pushed that business?

A. As much, and use our money, and would have to curtail our other business in using the money we had.

Q. 55. So, then, for practically five years, the period covered by this contract, you had been doing substantially nothing toward pushing or building up sales of gasoline and refined oil?

A. We were doing about the same amount of business we had been doing for the previous two or three years in coal oil.

Q. 56. But you had not been pushing the business and endeavoring to build it up during the pendency of this contract?

A. No, sir; and I doubt very much if we would have *been* done much pushing of it, even if we had not had the contract. Conditions generally were absolutely unfavorable for us to do very much business at all.

Q. 57. Have you any such agreement with the Standard Oil Company now?

A. Absolutely no agreement whatever, sir.

Q. 58. You were still in the market as an independent dealer in oil?

A. Absolutely. Buy some from them and some from other people, from whoever we can get the best goods for the least money.

Q. 59. Who were present when the terms of this agreement were entered into; I mean, upon the part of the Standard Oil Company?

A. As well as I remember, Mr. Collings. I think we discussed the main features, points and so on.

Q. 60. Was Mr. Collings down here before this paper was signed?

A. No, sir.

Q. 61. Did some officers of the Standard Oil Company come down here before this paper was prepared?

A. No, sir. Mr. McDonald, I think, was the President or Vice-President of the Ohio at that time, I think.

Q. 62. It just says McDonald, President?

A. He was probably President of the Ohio at that time, and the old gentleman has adjoining offices to the office where Mr. Collings and I fought the thing out, and came in. We got it in shape, and, after getting it in shape, my recollection is that he called Mr. McDonald, who is a very old man, into the office and had him sign the agreement. That is my recollection.

Q. 63. You say Alexander McDonald was President of the Standard Oil Company of Ohio?

203 A. I think so. It may have been of Kentucky, I don't know. I know he was a big official there.

Q. 64. Did you just go to Cincinnati with this in your mind before anything had transpired between you and anybody connected with the Standard Oil Company?

A. I cannot remember just how it came up, sir. It is possible I was invited there by mail, it is possible.

Q. 65. To refresh your recollection, isn't it a fact that some officials of the Standard Oil Company either came down and suggested

a settlement of differences, or they wrote you suggesting a conference and settlement of differences?

A. I cannot recall anything prior to my visit up there.

Q. 66. So, you cannot be clear in your mind as to what happened prior to your actually going to Cincinnati, is that it?

A. That is it. I am satisfied, though, there was no official came down here to see us on that business. I cannot recall just whether I had a letter inviting me to come up there, or, if so, what was contained in that letter. I know I have had such letters.

Q. 67. What was the other department of the oil business to which the Cassetty Oil Company directed its energies and capital, after the execution of this contract?

A. Lubricating oils and axle grease.

Q. 68. And that was not covered by this agreement?

A. No, sir.

Q. 69. And that business you devoted your entire capital and the energy of its officials?

A. And the manufacture of soap, that has taken three times as much capital as the other business put together.

Q. 70. Soap was not covered by this agreement?

A. No, sir.

Q. 71. So, lubricating oil, axle grease and soap, after the execution of this agreement, the Cassetty Oil Company directed its energies and practically its entire capital?

A. Yes, sir.

Q. 72. Where was your soap house or manufactory, here in Nashville?

A. Yes, sir; right on the same ground as our other factory.

Q. 73. You are still continuing in the soap business?

A. Yes, sir; I am sorry to say.

Q. 74. You are the President of the Cassetty Oil Company now, are you?

A. Yes, sir.

Q. 75. And this agreement, Exhibit "A" to Mr. Cassetty's deposition, has been in your possession ever since it was executed?

A. No, sir; it was in the safe with our other contracts and papers, and why Mr. McComb didn't destroy it at the termination
204 of the contract, as we always do, I don't know. We have various contracts for different raw materials with different people; that at the end of each year we make another contract maybe and destroy the old one; I didn't know that the contract was in existence.

Q. 76. I didn't mean it had been in your personal custody, but it has been there among the papers of the Cassetty Oil Company ever since it has been executed?

A. Yes, sir. When Mr. Cassetty spoke to me first about it, about the meeting he had or had seen you, and when he first spoke to me about the matter, I went to the safe and looked through the papers, not expecting to find it, but did find it. After I did find it, I kept possession of it.

Q. 77. And brought it here this morning?

A. Yes, sir. I could further add to that, you are the only man connected with the thing that has ever seen it; none of the Standard Oil people have seen it.

Q. 78. The Standard Oil Company people had a copy of the contract, didn't they?

A. They did originally, but I suppose they destroyed those things; I don't know.

Q. 79. Why did you volunteer the suggestion, Mr. McIlwaine, that I was the only one that had seen it, and particularly that no Standard Oil man had seen it?

A. Well, sir, to be entirely candid, and not to go in the record—

Q. 80. Yes, I want it to go in the record. I want to know precisely why you volunteered the statement that the Attorney-General was the only one that had seen it and no one connected with the Standard Oil Company had seen it, this particular paper. Why did you volunteer that particular statement?

A. Well, Mr. Casetty's relations with me have been very strained for a good while, and he asked about this contract out there and he got very little satisfaction about the contract, and I didn't know what evidence he might give on that point.

Q. 81. Well, now, Attorney-General Cates never saw this paper until this morning, did he?

A. No, sir.

Q. 82. It was never furnished to me until this morning?

A. No, sir.

Q. 83. Although he attempted repeatedly to secure either it or a copy of it?

A. I never had any request for it, nobody but Mr. Casetty, and I pay but very little attention to what he says.

Q. 84. Mr. Casetty did tell you that the Attorney-General wanted this paper or a copy of it?

A. He told me that he had promised the Attorney-General to have it there by one o'clock one day, and I had no chance to speak
205 to anybody about it then, and didn't know that the contract was in existence or what business he has, as an employe of the company now, should go and promise the Attorney-General a copy of a paper that he didn't know whether it was in existence or not.

Q. 85. Now that answers that part of it in regard to your statement that the Attorney-General had not seen it or read it. Why did you state no one connected with the Standard Oil Company had seen it?

A. Simply to counteract any evidence Mr. Casetty might have put in on that point or suggested to you personally; I don't know what the man is capable of.

Q. 86. So, you came to make that explanation in regard to that in order to contradict or counteract anything Mr. Casetty may have said in his examination?

A. No, I didn't come here for that purpose; I simply mentioned it in a running conversation.

Q. 87. Then you did make it in order to contradict anything Mr. Casetty may have said about the contract?

A. Yes, sir.

Q. 88. Do you know that Mr. Cassetty ever suggested to the Attorney-General or testified as a witness, that any official of the Standard Oil Company or any attorney of the Standard Oil Company ever saw, or didn't see, that paper?

A. No, sir.

Q. 89. Then, what reason did you have for making that explanation?

A. Simply because I have been so deceived in the man, and I know that his venom is so strong against me and against the Cassetty Oil Company that he might overdraw his imagination.

Q. 90. Then it is manifest that there is considerable friction between the officials of the Cassetty Oil Company?

A. The friction is on the other part, General.

Q. 91. Well, there is friction?

A. Yes, sir.

Q. 92. I only ask that, and refer to it, Mr. McIlwaine, because of your statement. I had no desire or intention to inquire into the business matters and the internal business and domestic affairs of the Cassetty Oil Company.

A. Yes, sir.

Cross-examination.

By Mr. VERTREES, for Defendant:

Q. 93. When was Mr. Cassetty retired as President of the company?

A. This last July, two years ago.

206 Q. 94. I believe he is on the board of directors?

A. Yes, sir.

Q. 95. Has he any official position?

A. No, sir.

Q. 96. What is his connection with the company?

A. He is employed by Mr. Weakley, manager of our sales department, to look after the local city trade.

Q. 97. In other words, he is city salesman, is that it?

A. Yes, sir.

Q. 98. On a salary?

A. Yes, sir; looks after special parts of it, the lubricating parts particularly.

Q. 99. What salary is he paid?

A. A hundred dollars a month.

Q. 100. You have mentioned that he had had some conversation with the Attorney-General. Do you know whether he made any communications to the Attorney-General on the subject of this Standard Oil Company case or not?

A. I know practically nothing about it. I only had one conversation with him on the subject, and that was at the time that he told me the Attorney-General—that he had promised the Attorney-General this paper, which was in the custody of the Secretary and Treasurer, and the Secretary and Treasurer had not been to the office for several days and did not come for several days afterwards,

and that was the only time we ever discussed it. I was talking to him down stairs fifteen or twenty minutes and he never mentioned the case. I didn't know that he had been asked by the Attorney-General for this paper, but the one time.

Q. 101. Do you know that he has been examined as a witness this morning?

A. I only know when he came out awhile ago he called "next" to me, and I saw him come in with the Attorney-General before.

Q. 102. Your recollection is, that the first thing in connection with this matter was your trip to Cincinnati?

A. Yes, sir.

Q. 103. And that there the contract was threshed out and agreed upon?

A. Provided my people would agree to it.

Q. 104. Wait a minute. Between you as representative of your people and Mr. Collings as the representative of the Standard Oil Company, provided your people would agree to it?

A. Yes, sir.

Q. 105. You expected to get their ratification?

A. Had no doubt about it.

Q. 106. Had you and he come to terms up there?

A. Yes, sir.

207 Q. 107. And by whom was the contract drawn up?

A. By the Standard Oil people.

Q. 108. At Cincinnati?

A. Yes, sir.

Q. 109. And when the contract was drawn up, you say he called in Mr. McDonald to sign it as President?

A. Yes, sir.

Q. 110. Had Mr. McDonald taken any part in the negotiations or the making of the contract?

A. I think not.

Q. 111. Mr. Collings was the active man?

A. Yes, sir.

Q. 112. I believe you said Mr. McDonald was rather an elderly man?

A. Yes, sir.

Q. 113. So that the contract was made at Cincinnati, in the State of Ohio?

A. Yes, sir.

Q. 114. And prepared there and signed there by the company and sent to you for you to sign it at Nashville?

A. That is my recollection of it; yes, sir.

Q. 115. And you did so that?

A. He probably gave me both of them there to bring and sign here and return. I don't remember just that, but I remember that Mr. McDonald was called into the room after the contract was ready.

Q. 116. To affix his signature?

A. I think that was it.

Q. 117. The oil that this contract covers was to come in tank

cars, or if you should see fit to change the method of delivery, by mutual consent, that could be done?

A. Yes, sir.

Q. 118. Now, where was the oil you were to get under this contract to come from?

A. That was optional with them, but no original point of shipment south of—well, from their refineries.

Q. 119. Was it to be delivered from Nashville or the Nashville station, or from their refineries?

A. From their refineries.

Q. 120. Where were they located?

A. Well, we received the great bulk of the oil under that contract from Whiting, Indiana.

Q. 121. Did they have any refinery in the State of Tennessee?

A. No, sir.

Q. 122. Do you know whether or not, or were you informed whether or not legal advice was taken as to the validity of the contract, when it was entered into?

208 A. That is my impression; that is my recollection, that they were acting clearly within the law.

Q. 123. But what I mean is, did they take advice on that subject and communicate that fact to you?

A. My recollection is Mr. Collings told me that the contract had been passed upon by lawyers and it was entirely all right.

Q. 124. Did you have any counsel to look at it?

A. No, sir; we never had any occasion to use counsel for anything, up to two years ago.

Q. 125. This contract was to run for a period or term of five years, and therefore expired October 30th, 1904, as it is dated October 30th, 1899. Now, when it approached the period of expiration, do I understand you made an effort to have it renewed?

A. Yes, sir.

Q. 126. Who did you see on that subject?

A. Mr. Collings.

Q. 127. Where did you see him?

A. In Cincinnati.

Q. 128. Did you go up there to see him for that purpose?

A. Yes, sir.

Q. 129. State what happened with reference to it?

A. Well, I just fell down; I could not make any kind of a deal with him at all. He stated that he could not consider it for the reason that there were a good many laws being put on the statute books around, aimed largely at the Standard Oil Company, and he did not know whether there was anything in the Tennessee laws that would prohibit it especially, but he had instructions to cut out everything of that kind, and I could make no arrangement of any description with him other than he would be glad to sell us oil at competitive prices whenever they had it to sell, and that was the best he was able to do.

Q. 130. It says, you agree and bind yourself to furnish all the labor necessary in the handling of said refined oil and gasoline busi-

ness, cooperage of barrels or packages, preparation and filling of same, draying and delivering, receiving and unloading, refined oils or gasoline, and to furnish all clerical help requisite for the keeping of accounts, necessary office room, account books, stationery, etc., used in the conduct of said refined oil and gasoline business; also to furnish the requisite salesmen for the selling and marketing of said refined oils and gasoline, without expense or cost to the party of the first part, except as hereinafter named. Then, it says, the party of the second part further agrees and binds itself to aid and assist in every way possible the development of the refined oil and gasoline business, and to give its support and co-operation towards furthering

the general interest of the party of the first part. Then it says should you sell more than two hundred thousand gallons a year, you shall have one cent per gallon on the excess.

If I have gathered from you, you made no real active effort to sell coal oil, for the reason, that by an active effort, you did not think you could bring your sales to that quantity?

A. Never in the world.

Q. 131. And were getting as much for being inactive as if active?

A. Yes, sir; and it didn't require any of our money and it would have taken our capital to have pushed that business, and therefore I didn't press that part.

Now, if that was an infringement of the contract, we were not called down on it?

Q. 132. Were you making reports?

A. Yes, sir.

Q. 133. Now, do I understand you to say, though, you were practically selling as much oil as before the contract was made?

A. As I remember it, we were doing about the same amount of business in the coal oil as we were during the time that the fight was on between the Standard Oil Company and Miller, the previous years.

Q. 134. How long was that?

A. Six or seven years. We didn't lose all our business the first one, but when they got right down to brass tacks, you know, we were threshed out of it.

Redirect examination.

By Mr. CATES, Attorney-General:

Q. 135. You say it is your recollection that you brought this paper, the contract of October 30th, 1899, back from Cincinnati and submitted it to your Board of Directors?

A. No, to Mr. McCombs and Mr. Cassetty and I. We owned practically the company at that time.

Q. 136. What kind of a committee were you three called, or board?

A. Well, under our by-laws we were not a special committee, probably.

Q. 137. You did submit it to Mr. McCombs and Mr. Cassetty?

A. Yes, sir.

Q. 138. And you three approved it?

A. Yes, sir.

Q. 139. Thought it was a good contract?

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A. Yes, sir.

210 Q. 140. How did you get the contract back to the Standard Oil Company that was to go back to them; mail it back to them or deliver it to the agent here?

A. I am satisfied that we never gave anything to any agent here. The agent here was not supposed to know anything about the contents of the contract.

Q. 141. Then, the agent didn't know anything about what was going on between you and the Cincinnati office?

A. Not as far as I am informed.

Q. 142. Then, did you mail it back to Cincinnati?

A. It has been eight years ago; I cannot remember. I assume so.

Q. 143. You didn't take it back in person?

A. I don't remember that I did.

Q. 144. Now, when you went up there and that contract was prepared, you told Mr. Vertrees that Mr. Collings informed you that he had taken advice from lawyers about its legality, and that it was all right?

A. Yes, sir. My recollection on that subject is that I asked whether or not there was any doubt whatever about——

Q. 145. About the validity of the contract?

A. About it being all right.

Q. 146. Did you have any doubt about it being all right?

A. Not a particle.

Q. 147. What suggested the possibility of a doubt?

A. Simply because there was — of them had been jumping on the Standard Oil Company, you know, for ten or twelve years, about, and I didn't want to get into anything that was out of line.

Q. 148. And he assured you it was all right?

A. Yes, sir.

Q. 149. But when you went back to get it renewed, he also assured you that there was great doubt, and therefore would not renew it?

A. Yes, sir; he also said, well, I don't know about the doubt, that he was not going to take any chances on making any such deal. I remember when I came back and reported, that Mr. Cassetty suggested that they had just thrown the hooks into me; that they had about squeezed the lemon and they had control of the marketing, and that was the reason they didn't do it; that was his idea.

Further this deponent saith not.

JAMES R. McILWAINE,

By ———, *Stenographer and Notary Public.*

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Defendant's Evidence.

Filed July 5, 1907. (Trans., Vol. 2, p. 9.)

In the Chancery Court of Sumner County, Tennessee.

STATE *ex Rel.**versus*

STANDARD OIL COMPANY OF KENTUCKY.

The deposition of S. W. Coons, taken on notice hereto attached, on this the 25th day of June, 1907, at the office of Vertrees & Vertrees, No. 32 Noel Block, Nashville, Tennessee, to be read as evidence on behalf of the defendant on the trial of the above entitled cause.

Present: Attorney-General C. T. Cates, Jr., Esq., and William A. Guild, Esq., representing the State; James W. Blackmore, Esq., and John J. Vertrees, Esq., representing the defendant; and Buford Duke, Stenographer and Notary Public.

Caption, certificate and all formalities waived; and it is agreed that the Notary Public, who is a stenographer, may swear the witness, take down his deposition in shorthand, transcribe the same into typewriting and sign the name of the witness thereto, the signature of the witness being waived.

Said witness, S. W. COONS, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for defendant:

Q. 1. State your age and your residence.

A. Fifty-one years; residence, Louisville, Kentucky.

Q. 2. What is your business?

A. Special agent for the Standard Oil Company.

Q. 3. How long have you been in the service of the Standard Oil Company?

A. Since the fall of 1881.

Q. 4. What positions have you occupied?

A. During most of that time I have acted as special agent at various places.

Q. 5. What is a special agent, and what are his duties?

A. A special agent is one who has charge of what we term
212 a main station and its sub-stations. A main station is one that has a complete organization, accountants, clerks, traveling men, etc.

Q. 6. What is a sub-station?

A. A sub-station is a station that is under the supervision of the main station.

Q. 7. What is the agent called that is in charge of the sub-station?

A. Called the sub-agent.

Q. 8. Is he sometimes called the local agent?

A. Yes, sir; sub-agent or local agent.

Q. 9. What are his duties?

A. He is to receive oils shipped to that sub-station for distribution; is to make deliveries of such oils under the supervision and direction of the main station, and to render to the main station reports covering his sales and the work that he performs there.

Q. 10. Is that an organized office—that is, with clerks, accountants or anything like that?

A. No, sir.

Q. 11. What are the duties of the salesman?

A. A certain territory—a salesman has certain towns and counties that he visits, solicits trade, visits these sub-stations, takes inventories from time to time; I would say, once every sixty or ninety days.

Q. 12. Takes an inventory of what?

A. An inventory of stock on hand, oils and merchandise.

Q. 13. How often does the sub-agent or local agent report to the special agent?

A. He reports daily. He has daily reports that are filled out, showing sales that he makes from that sub-station, sending in invoices and making deposits in the local bank and reporting such deposits.

Q. 14. Do those daily reports make a report of the quantity of oil on hand, as well as the oil sold?

A. No, sir.

Q. 15. Does he make reports—if so, how often—of the quantity of oil he has on hand?

A. My custom has always been, and it is, as far as I know, the general custom, to require those agents to take an actual inventory themselves at the close of each month.

Q. 16. Well, now, in what form is that report? What is it called—report of what, in the language of the business?

A. Well, it is the number of inches of oil in the storage tank; number of barrels of oil or other goods he may have in his storage tank or warehouse.

213 Q. 17. What do you mean by the number of inches in the storage tank?

A. I mean, if a storage tank has a diameter of ten feet, he puts a rod into the tank and he gets the number of inches of oil in that storage tank, and if it is five feet, or sixty inches, he reports that as being the amount of oil on hand in the storage tank.

Q. 18. Then, at the office reported to, there is a computation made of what that means, is there—how many gallons?

A. Yes, sir.

Q. 19. As I understand you, as a rule, those reports are made monthly?

A. Yes, sir; the sub-agent, as a rule, sends a memoranda report

to the special agent's office once a week, simply for the stock clerk to know how much oil he has on hand, so that he can order oil before the supply is exhausted; but that is never considered necessarily an accurate inventory, as it is not turned over to the stock clerk to figure the actual number of gallons on hand and balanced, as is done once a month.

Q. 20. But that is done on the monthly reports?

A. Yes, sir.

Q. 21. What control, if any, has a salesman over a sub-agent?

A. He has no real control whatever.

Q. 22. What does he do with reference to him? What duties has he with reference to the sub-agent?

A. The salesman visits the sub-station; he calls on the sub-agent, as a rule; asks him how the trade conditions are in his locality; and visits the merchants in town in that particular circuit. If he finds the trade wanting oil, wanting the tank wagon, for example, to come more frequently; he reports both to the special agent, and he should report to the sub-agent, telling him that John Smith, at Jamestown, is complaining on account of the tank wagon not visiting him sufficiently often.

Q. 23. What I want to get at, is that report in the nature of information or in the nature of instructions and orders from him?

A. The salesman is always in the nature of information. The sub-agent is not under the direction of the salesman.

Q. 24. Does the salesman ever examine any of the books or reports of the sub-agent or local agent?

A. No, sir.

Q. 25. As I understand you, he does go about every sixty days and takes a stock of the things actually on hand?

A. Yes, sir.

Q. 26. And reports to whom?

A. Reports to the special agent's office.

214 Q. 27. The prices at which oil is sold—who determines and fixes them in any given territory?

A. Our general offices, at Covington, Kentucky, by Mr. Collings.

Q. 28. What I wanted to get at, then, is, even a special agent does not do that?

A. No, sir.

Q. 29. But it is from some one above him?

A. Yes, sir.

Q. 30. Who is that somebody called?

A. In our case, it is Mr. C. T. Collings, second vice-president.

Q. 31. Then, through him the prices come to the special agent, as I understand you?

A. Yes, sir.

Q. 32. Who do sub-agents and salesmen get the prices from and how?

A. They get them from the special agent's office.

Q. 33. Now, what authority have either sub-agents or salesmen as to prices?

A. They have absolutely none.

Q. 34. What do you mean by that?

A. I mean, when they are advised of prices at a given point, they have no authority to change them.

Q. 35. They must sell at those prices given them?

A. Yes, sir.

Q. 36. And, as I understand you, both salesman and sub-agent get prices at which they must sell oil, from the special agent?

A. Yes, sir.

Q. 37. And the special agent, in turn, received them from his superior, in this case being the second vice-president, Mr. Collings?

A. Yes, sir.

Q. 38. Is there any other intermediate agent of the company other than the special agent, sub-agents and salesmen? Is there any other class of agent used in the business?

A. No, sir.

Q. 39. Now, you have said that you had been in the service of the company as special agent at various places. Name the places.

A. Augusta, Georgia; Charleston, South Carolina; Chattanooga, Tennessee; Nashville, Tennessee; and Louisville, Kentucky.

Q. 40. Where are you special agent now?

A. Louisville, Kentucky.

Q. 41. When were you the special agent at Nashville, Tennessee?

A. From 1897 to 1902.

215 Q. 42. Whom did you succeed in 1897 at Nashville, as special agent?

A. Andrew Clark.

Q. 43. Is he living or dead?

A. He is dead.

Q. 44. Who succeeded you as special agent at Nashville, Tennessee?

A. J. E. Comer.

Q. 45. And that, as I understand you, was in 1902?

A. Yes, sir.

Q. 46. Is he living or dead?

A. Dead.

Q. 47. When did he die?

A. October 15, 1906.

Q. 48. Who succeeded him at Nashville, Tennessee?

A. I was sent to Nashville after the death of Mr. Comer to assume temporary charge until some arrangement could be made to appoint a successor.

Q. 49. How long were you in charge temporarily?

A. I was here, as I remember, about eight or ten days.

Q. 50. Then who came in as permanent agent?

A. There was no permanent agent appointed until January 1, 1907.

Q. 51. Who was in charge between the time of Mr. Comer's death and January 1, 1907?

A. Mr. Radcliff. He was assisting Mr. Comer at the time of his death?

Q. 52. Then who succeeded him?

A. T. P. Wilson, January 1.

Q. 53. Is he at present the agent?

A. Yes, sir.

Q. 54. Is the agency at Nashville still a special agency, or not?

A. No, sir.

Q. 55. What is it?

A. It is what we term a sub-agency.

Q. 56. When was it made a sub-agency?

A. January 1, 1907.

Q. 57. Up to that time had it been a special agency?

A. Yes, sir.

Q. 58. During that time that you and Mr. Comer and Mr. Clark were in charge?

A. Yes, sir.

Q. 59. Then, practically, it is on a basis that Gallatin is, as a sub-agency?

A. Yes, sir; practically so.

216 Q. 60. What was Gallatin, and what is Gallatin?

A. Gallatin is a sub-station.

Q. 61. Has it always been a sub-station?

A. Yes, sir.

Q. 62. I meant Gallatin, Tennessee, of course.

A. Yes, sir.

Q. 63. Was it a sub-station during your administration?

A. Yes, sir.

Q. 64. Where is the principal office to which all of these agencies in this territory report?

A. At the present time?

Q. 65. Yes.

A. Louisville, Kentucky.

Q. 66. Then, you are the special agent at Louisville?

A. Yes, sir.

Q. 67. What is your territory?

A. It comprises Middle and Western Kentucky, and some sixteen or eighteen points in Tennessee.

Q. 68. What constituted the Nashville territory when Nashville was a special agency?

A. Middle Tennessee and all of East Tennessee, including Chattanooga and Knoxville, and a small portion of North Alabama, and some two or three counties in Kentucky, including Scottville, Kentucky, especially.

Q. 69. Was that the condition all the time that Nashville was a special agency?

A. Not all the time. When I was in Chattanooga it was considered, and was in fact, a special agency. After I left Chattanooga, that part was consolidated with Nashville, and it was considered under Nashville, and was under Nashville.

Q. 70. At the time Nashville was a special agency, to whom did it report?

A. To the general office.

Q. 71. Where was the general office?

A. At that time the general office was in Cincinnati, Ohio.

Q. 72. Where is it now?

A. Covington, Kentucky.

Q. 73. Who is in charge of the general office?

A. Mr. C. T. Collings.

Q. 74. What is his position?

A. Second vice-president.

Q. 75. Now, as I understand you, at this time, Nashville being a mere sub-station, is in the Louisville territory and reports to Louisville?

A. Yes, sir.

217 Q. 76. To you?

A. Yes, sir.

Q. 77. And to whom do you report?

A. To the general office, at Covington, Kentucky.

Q. 78. You have explained the business system and organization. How long has that been the case in this territory, Mr. Coons, of sub-agents, salesmen, special agents, etc.?

A. As long as I have been with the company.

Q. 79. That system is general, then, as I understand you?

A. Yes, sir.

Q. 80. Speaking now with reference to the company's system of doing business with its customers, what is its system of sales and deliveries, in general and particular, throughout what we call the Nashville territory?

A. Through the tank wagon system with refined oil.

Q. 81. Explain what that is, Mr. Coons.

A. At these various sub-stations, we locate storage tanks; we receive oil by tank cars, emptying the contents into these storage tanks. We have tank wagons which we fill directly from these storage tanks and deliver directly to the merchants, putting the oil in their tanks, not only at the sub-stations, but at various points in the surrounding district, often going out as far as twenty-five or thirty miles.

Q. 82. Country merchants and village merchants?

A. Yes, sir.

Q. 83. Those tank wagons are iron tanks on wagons, are they?

A. Yes, sir.

Q. 84. Now, when did the company introduce that system into Tennessee?

A. It was in use at the larger points when I first went with the company.

Q. 85. What were the larger points?

A. Well, say Memphis, Nashville and Chattanooga, and, I think, at Knoxville.

Q. 86. Was that system in use at any other points at that time?

A. Not that I remember of, but we immediately commenced locating tanks at other points and introducing the tank wagon system of delivery.

Q. 87. You mean, at other points than the principal towns in Tennessee?

A. Yes, sir.

Q. 88. Has that been the course of business and system of the company to expand and introduce the tank wagon system and the storage tank system?

A. Yes, sir.

218 Q. 89. Was that the case in 1903?

A. Yes, sir.

Q. 90. How many stations at which you have storage tanks and the tank wagon system, has the company in the State of Tennessee?

A. I have a memoranda of the points which I can give you. There are forty-nine bulk stations in Tennessee.

Q. 91. How many tank-wagons has the company in use in Tennessee?

A. Seventy-six, at the present time.

Q. 92. Do you know how many bulk stations and how many tank wagons the company had in Tennessee in 1903?

A. They had about the same number of bulk stations—forty-nine.

Q. 93. Do you know how many wagons?

A. I don't know the number of wagons, but I should say practically the same.

Q. 94. Now, will you please give the names of the bulk stations?

A. I will. They are as follows:

Tennessee Bulk Stations.

Town.	County.	No. tank wagons.
Allgood	Putnam	1
Athens	McMinn	1
Bear Springs.....	Stewart	1
Brownsville	Haywood	1
Chattanooga	Hamilton	5
Clarksville	Montgomery	2
Cleveland	Bradley	1
Coal Creek.....	Anderson	1
Columbia	Maury	2
Covington	Tipton	1
Danville	Houston	1
Dayton	Rhea	1
Dickson	Dickson	1
Dyersburg	Dyer	1
Erin	Houston	1
Fayetteville	Lincoln	1
Franklin	Williamson	1
Gallatin	Sumner	1
Greeneville	Greene	1
Harriman	Roane	2
Humboldt	Gibson	1
Jackson	Madison	1

	Town.	County.	No. tank wagons.
	Johnson City.....	Washington	2
219	Jellico	Campbell	1
	Knoxville	Knox	3
	Lawrenceburg	Lawrence	1
	Lebanon	Wilson	1
	Lewisburg	Marshall	1
	Martin	Weakley	1
	McKenzie	Carroll	1
	McMinnville	Warren	1
	Memphis	Shelby	11
	Morristown	Hamblen	1
	Murfreesboro	Rutherford	1
	Nashville	Davidson	11
	Obion	Obion	1
	Paris	Henry	1
	Pulaski	Giles	1
	Ripley	Lauderdale	1
	Shelbyville	Bedford	1
	South Pittsburg	Marion	2
	Sparta	White	1
	Springfield	Robertson	1
	Sweetwater	Monroe	1
	Tracy City	Grundy	1
	Tullahoma	Coffee	1
	Union City	Obion	1
	Whiteville	Hardeman	1
	Winchester	Franklin	1
	Total		76

Q. 95. Has the company what it calls barrel stations, in Tennessee?

A. Yes, sir.

Q. 96. What are they?

A. Where there are small warehouses located, no storage tanks, but oil is shipped there in barrels and sold in barrels.

Q. 97. How many of them has the company in Tennessee, and where are they located?

A. Seven; Johnsonville, Tenn.; Lexington, Tenn.; Mountain City, Tenn.; Newport, Tenn.; Rogersville, Tenn.; Watertown, Tenn.; and Cooksville, Tenn.

Q. 98. Has any competitor in the oil trade of the Standard Oil Company any bulk stations or storage tank stations and tank wagon systems in Tennessee?

A. Yes, sir.

220 Q. 99. What companies?

A. The Gulf Refining Co. I don't remember the name of the company at Knoxville. The Gulf Refining Co. has storage tanks at Memphis, Nashville and Chattanooga, and one, or perhaps two, concerns that I understand have storage tanks and tank wagons at Knoxville.

Q. 100. Have any of the competitors of the Standard Oil Company the storage tank and tank wagon system at any other place than the four cities you have mentioned?

A. No, sir; not to my knowledge.

Q. 101. Has it ever had?

A. No, sir.

Q. 102. What is the value of the company's storage tank plants and tank system? I mean by that, the warehouses, storage tanks, wagons, animals, equipment and everything necessary. What is the value of all that property used in that system—in that business—in Tennessee?

A. Value of plants in Tennessee, December 31, 1906, \$166,925.40; value of tank wagons, trucks, harness and animals, December 31, 1906, \$31,320.73.

Q. 103. What is the aggregate annual tax paid by the company in Tennessee, and what was it for last year, for doing business in Tennessee?

A. The amount of license tax paid for 1906, \$8,482.80; amount of taxes, \$2,415.93.

Q. 104. What was the amount of the inspection fees paid to inspectors during the year 1906?

A. I thought I had a memoranda of that, but it is about thirty-nine or forty thousand dollars. But that is a matter of record at the Comptroller's office, I should judge.

Q. 105. What are the advantages of this storage tank and wagon tank system of the company over any other system of delivering oil? The advantages to the company and the advantages to the merchants and the consumers and the advantages to everybody, if there are any?

A. By delivering to the merchants by means of a tank wagon, he is saved the expense and bother of handling barreled oil by having the oil put into his storage tank in any quantity he desires, from twenty to a hundred gallons. He is able to get this oil whenever he wanted it, without any delay in shipment; he receives actual measure; there is no loss from leakage or evaporation; the oil is naturally purer and better, delivered from tank wagons, than it would be if delivered in barrels, for the reason that these barrels have to be glued and prepared so that they will hold oil. Most generally they are oil

221 barrels that have been used repeatedly, allowed to stay out in the weather, and very frequently there is an accumulation of dust and dirt that gets into the barrels when they are emptied, and all of this is avoided when the delivery is made through the tank wagon system.

Q. 106. What do you mean by the avoidance of delays. Illustrate what you mean by that?

A. When oil is handled in barrels, a merchant ordering it from some distributing point, very frequently, and most generally, the railroads have certain days on which they will receive oil for shipment, usually two days in a week. Then again, very often there is a delay in transit and the oil does not reach him promptly after shipment is made. The merchant might be ordering the oil and order a barrel or more, and if there is any delay, he would run out, while, on the

other hand, all he has to do is to telephone or notify the nearest station where there is a tank wagon, and that tank wagon supplies him promptly, and most generally at all of these stations the wagon has certain days on which it visits the trade. As a rule, in a town like Franklin, for example, they will have either two or three days in the week to visit the trade and supply them with oil, and there is no possible chance for a merchant to suffer for the want of oil.

Q. 107. Now, in the matter of shipments, what about purchases where a man purchases in barrels, shipped by car loads, in order to get the benefit of rates? Does the question of car loads cut any figure?

A. Yes, sir; the question of leakage, insurance, and the expense of handling this barreled oil, bringing it to their store, pumping it out and shipping back the empty barrels.

Q. 108. What I had special reference to was this: If a merchant orders a few barrels of oil, less than a car load, does he get it at the same freight rates as he would if he ordered a car load?

A. No, sir; the classification is higher.

Q. 109. Well, as a rule, the ordinary merchant keeps on hand about how much oil? Would you say as much as a car load?

A. No, sir; one or two barrels.

Q. 110. What is a car load—how many barrels, on an average?

A. Sixty.

Q. 111. And you say he keeps a few barrels only, one or two?

A. An ordinary merchant, I should say, would, in ordering barreled oil, order one or two barrels. In the busy season, during the winter time, when more oil is consumed, perhaps five barrels at a time.

Q. 112. Is that system, the tank system, I mean, an advantageous one to the public?

A. Very great advantage, for the reasons just outlined.

222 Q. 113. You spoke of the trade. Does the company sell oil to consumers or to merchants?

A. To merchants.

Q. 114. Wholesale and retail both?

A. Yes, sir.

Q. 115. Do you know how far distant the tank wagons of the company were accustomed to run from Gallatin, and have been?

A. I think some twenty to twenty-five miles. I don't remember the exact distance to the farthest points.

Q. 116. How far is Gallatin from Nashville?

A. I don't remember, but about thirty miles, I think.

Q. 117. Has any company other than the Standard Oil Company, to your knowledge, ever attempted to introduce the tank system and tank delivery system at Gallatin, Tennessee?

A. No, sir.

Q. 118. And when I say to your knowledge, I ask you, in point of fact, if any one has ever attempted to do that?

A. No, sir.

Q. 119. You mentioned the fact that merchants in ordering oil would likely order more oil in the winter time than in the summer

time. What, in point of fact, is the difference in the consumption of oil by the trade at the different seasons?

A. During the winter season, when the days are short, naturally more oil is consumed; or, I should judge, thirty to forty per cent. more oil is consumed during the winter season than during the summer. But that is just an estimate.

Q. 120. The question of prices, as I understand you to say, is fixed by the head office?

A. Yes, sir.

Q. 121. That is to say, the special agents receive their orders as to prices for which the oil shall be sold at the different times, from their superior office, and has the special agent any authority to deviate from those prices?

A. No, sir.

Q. 122. And the Nashville office, while a special agency, received its orders from what place?

A. From the general office.

Q. 123. And what was the general office?

A. At that time, Cincinnati.

Q. 124. Mr. Collings being in charge?

A. Yes, sir.

Q. 125. Now, was the oil sold throughout Middle Tennessee during these times at the various towns that you have mentioned as being sub-stations, at the same price, at the same times, always, or was there some difference in the prices at these different places?

223 A. Difference in price.

Q. 126. What caused those differences in price? What conditions determine them?

A. First, freight rates from the point of supply or refineries to these various towns; this is the main reason for a difference in the price. Then again, at some points it costs more to market the oil than others. Road conditions may be such that the sub-agent has difficulty in making the outlying points, using perhaps four animals where, if road conditions were good, he could use two, and necessarily this adds to the cost of the marketing, which is taken into consideration in fixing the price of oil at these various points.

Q. 127. By that am I to understand this, Mr. Coons, to illustrate: There might be one town at which you had a sub-station in which the oil sold there was largely delivered in the town or close about, by reason of local conditions, or the roads might be good; then, upon the other hand, there might be another sub-station in which the oil was delivered much farther away from that central station, and along roads that were very different from the other, so that, while practically you might say the same quantity of oil would be sold at the two stations, in point of fact a greater bulk of that oil would be delivered at a distance from the tank at one place than it would at the other?

A. Yes, sir.

Q. 128. So, you say the freight rates and conditions like that, cause the difference at the different places?

A. Yes, sir.

Q. 129. Now, passing from that to the question of price at any given place during the year. Did that remain the same throughout they year, or did it fluctuate, and if you say they did, why?

A. They change from time to time, based on the cost of the oil, the price of the crude oil at the points of supply, such as refineries.

Q. 130. Do you know from what points the oil that has been coming into Tennessee or brought into Tennessee by your company is brought—from what refineries?

A. I don't know that it all comes from the same point, but frequently I know there are shipments that come from the Whiting, Indiana, refinery.

Q. 131. Are there any refineries in Tennessee?

A. No, sir.

Q. 132. And have there been any?

A. No, sir; not during the time I have been connected with the company.

Q. 133. Are you able to state what the prices have been in Tennessee throughout the territory known as the Nashville territory, beginning with the year 1903 down to date, giving the prices at the various places, or rather, the principal towns, and the fluctuations?

A. Yes, sir.

Q. 134. Please state them?

A. I here exhibit a memoranda of prices of fireproof oil from tank wagons, at Tennessee stations, during the years 1903 to 1907, inclusive, and I exhibit them as part of my deposition, market Exhibit No. 1 for the year 1903; Exhibit No. 2 for the year 1904; Exhibit No. 3 for the year 1905; Exhibit No. 4 for the year 1906, and Exhibit No. 5 for the year 1907, being up to the present time, or June 1.

Q. 135. I observe that the statements you have exhibited are given in this form: Under the line of date, taking the year 1903 for example, at Gallatin you have date 1-1-03. What does that mean?

A. January 1, 1903.

Q. 136. And underneath it appears .1450 cents?

A. Fourteen and a half cents per gallon.

Q. 137. You also have, continuing the line of date, 4-28-03. What does that mean?

A. April 28, 1903.

Q. 138. And underneath it, on the price list, you have .1400c. What does that mean?

A. Fourteen cents per gallon.

Q. 139. That runs throughout the statement in that way, does it, Mr. Coons?

A. Yes, sir.

Q. 140. Are these correct statements of what oil was sold for at the dates as indicated in these exhibits?

A. Yes, sir.

Q. 141. Now, does this represent the prices at which oil was sold per gallon at the station, delivered in the town, at these towns?

A. Yes, sir.

Q. 142. Now, suppose the case was one in which you delivered by tank wagon many miles from there—to illustrate, at Bethpage, Tennessee, twelve miles from Gallatin. Would you sell to that merchant at that far distance at the same price as at Gallatin, or would something be added to that?

A. Usually about a cent a gallon is charged or added to the price current at the sub-station; that is to cover, partly, the cost of hauling the oil out there and delivering it there.

Q. 143. Within what radius would the oil be delivered at those sub-stations, as a rule?

A. Well, the sub-station price would only hold good at very nearby points, or points where merchants could receive oil by freight at the same rate as they could receive it at the sub-station proper.

225 Q. 144. But, at any place in the town or nearby where the sub-station was located, oil was delivered to the merchants at these prices?

A. Yes, sir.

Q. 145. But, if they were at a considerable distance, there was a difference, unless they were, for instance, on a line of railway where they could get it and it be delivered there at the same price; then you deliver it this way, at the same price?

A. Yes, sir.

Q. 146. Give the price of oil at the various dates you have set forth in Exhibit No. 1, at Gallatin, Tennessee, for the year 1903?

A. January 1, 1903, the price was 14½ cents per gallon; April 28, 1903, 14 cents per gallon; June 5, 1903, 13½ cents per gallon; October 27, 1903, 14½ cents per gallon.

Q. 147. Now, give the prices at Gallatin for the year 1904?

A. The price remained the same from October 27, 1903, until March 8, 1904, when it was 14 cents; May 24, 1904, 13½ cents. There was no change during the balance of the year 1904 until January 17, 1905, when it was 13 cents; February 22, 1905, 12½ cents; April 24, 1905, 12 cents. There was no change in price from that date until June 15, 1906, when it was 11½ cents; August 18, 1906, 11 cents. No change from that date until the present time, 1907, the price remaining the same, 11 cents.

Q. 148. Now, in the statements which you have exhibited and made part of your deposition, you have given the prices, say, about three times during the year. Now, state what that means. What I want to get at is this; when the price is stated in your exhibit as of a given date, say June 6, 1903, and then the next thing given is of October 30, 1903, does that mean that the price has remained the same throughout that time from June until October, that it was June 6?

A. Yes, sir.

Q. 149. And so, throughout these statements, that is the case, as I understand you?

A. Yes, sir.

Q. 150. You have described in these statements the oil which you were accustomed to sell as fireproof oil. What is meant by fireproof oil?

A. Simply a name or a trademark applied to this particaulr grade of refined oil.

Q. 151. Was that oil tested by the inspectors under the Tennessee laws?

A. Yes, sir; always.

Q. 152. According to the fire test preescribed by law?

A. Yes, sir.

226 Q. 153. Did the company deal in any other grade or higher grade than the oil usually sold in this way?

A. In a limited way, and only in barrels. We had a grade of oil we called Eocene.

Q. 154. Do you have that oil now?

A. Yes, sir.

Q. 155. You say it is handled only in barrels?

A. Only in barrels, at larger stations. We carry some in stock here at Nashville.

Q. 156. Do you carry it anywhere else in Tennessee?

A. Possibly in Memphis, but I do not know of any other place.

Q. 157. About how does the price of that oil compare with the ordinary oil of commerce that you usually handle and sell?

A. About one cent and a half or two cents higher than what is known as fireproof oil.

Q. 158. About what per cent. of that goes to the trade—that Eocene oil?

A. In Tennessee?

Q. 159. Yes, first take Tennessee.

A. I should say, less than one-half of one per cent.

Q. 160. Well, within your knowledge, is that per cent. larger anywhere else, and if so, where?

A. No, sir; I do not know any other place where it would be larger.

Q. 161. The company has it for anybody that wants it?

A. Yes, sir.

Q. 162. But the price, as a rule, is about a cent and a half higher than the other?

A. Yes, sir.

Q. 163. Has the company, at any time, authorized or permitted orders of its competitors which had been taken by competitors from merchants ordering oil, to be countermanded by this company's agents, through gifts of oil or other like devices?

A. No, sir.

Q. 164. While you were agent at Nashville, did anything of that kind, to your knowledge, ever take place?

A. No, sir.

Q. 165. Has it taken place, to your knowledge, anywhere in Tennessee, since you have been special agent?

A. No, sir.

Q. 166. The only case, then, as I understand you, of which you have had any knowledge or information, is what is alleged to have occurred at Gallatin?

A. Yes, sir.

227 Q. 167. Are you acquainted with C. E. Holt and O'Donnell Rutherford?

A. I am with C. E. Holt, but I am not with Mr. Rutherford.

Q. 168. Was anything of that kind done while you were special agent at Nashville, by either salesmen or sub-agents or tank men, or anybody?

A. No, sir.

Q. 169. Has any accusation, other than the Gallatin case, ever been made against the company in Tennessee?

A. No, sir.

Q. 170. What are the standing orders of the company with reference to the prices at which oil shall be sold, and the disposition that shall be made of it?

A. As previously stated, these prices are fixed by our Mr. C. T. Collings, and neither the special agent, the salesman nor the sub-agent have any authority to change or deviate from those fixed prices without the knowledge and consent of our general officer, Mr. Collings.

Q. 171. How long has that been the course of business?

A. Ever since I was connected with the company. It was always necessary to take such matters up with our general office when prices were established at main stations and sub-stations.

Q. 172. Has any agent of the company, special agent, local agent, sub-agent or tank wagon man in Tennessee, ever been authorized or directed, to your knowledge, by Mr. Collings or any of the superior officers, to secure the countermanding of orders given competitors by gifts of oil or other similar practices?

A. No, sir.

Q. 173. Where were you in October, 1903?

A. Louisville, Kentucky.

Q. 174. In charge of the special agency there?

A. Yes, sir.

Q. 175. Where does Mr. C. T. Collings live?

A. He lives in Cincinnati.

Q. 176. How long has he been in charge as superior officer of the company's business in the Nashville territory, to your knowledge?

A. I should say since 1897, as well as I remember, and before he held the position of general manager and other positions; I don't remember just what they were.

Q. 177. What concerns, and I mean by that, corporations or firms or associations, are competitors of the Standard Oil Company in the oil business in Kentucky and Tennessee?

A. Some of them are, the Gulf Refining Company, Evansville Oil Company, the Kentucky Consumers' Oil Company, and C. C. Stoll Oil Company.

228 Q. 178. Where are these concerns located?

A. I understand the main or home office of the Gulf Refining Company is located at Pittsburg, Pennsylvania, and they have a Branch at Nashville, Chattanooga and Memphis; and the Evansville Oil Company is at Evansville, Indiana; the Stoll Oil Company and Kentucky Consumers' Oil Company are at Louisville, Kentucky.

Q. 179. Who was the sub-agent at Gallatin, Mr. Coons, when you were in charge of the Nashville station?

A. Mr. Charles Whitesides.

Q. 180. Charles or Jim?

A. James; yes, that is it, James Whitesides.

Q. 181. Do you know who succeeded him?

A. Mr. Rutherford.

Q. 182. Is Mr. Rutherford the agent there now?

A. No, sir.

Q. 183. Do you know who succeeded him?

A. Mr. Baber—Mr. W. H. Baber.

Q. 184. Since 1902 has the company continuously had an agent at Gallatin, Tennessee, and a station there?

A. Yes, sir.

Q. 185. Now, since 1902 has the company continuously had an agency and a special agency at Nashville, Tennessee, until you say it changed in 1907?

A. Yes, sir.

Q. 186. And since 1906 and during 1907 it has continuously had a sub-agency at Nashville?

A. Yes, sir.

Q. 187. Who is the agent here now?

A. Mr. T. P. Wilson.

Q. 188. How long has he been here?

A. Since January 1, 1907.

Q. 189. How long after Mr. Comer's death before you took charge of the Nashville office which you say you did temporarily?

A. I didn't take charge completely until January 1 of this year. I was only here temporarily for a week or ten days.

Q. 190. But was there an agent in charge of the local office here?

A. Yes, sir; Mr. Radcliffe was the one in charge.

Q. 191. Where did he live?

A. He lived in Nashville.

Q. 192. Did these Nashville agents you have mentioned as being in charge during the time you have stated, all live in Nashville, Tennessee?

A. Yes, sir.

229 Q. 193. And where did the agents you have mentioned as being in charge at Gallatin, Tennessee, during that time, live?

A. In Gallatin.

Q. 194. Do you know what county that is in?

A. I don't believe I do. Sumner County, isn't it?

Q. 195. What is the custom or usage, if there is any, and what has been the custom and usage, say, during the years you were at Nashville, with reference to the countermanding of orders by merchants—orders that had been given for the purchase and delivery of oil?

A. It frequently happens that merchants give us orders, either written, or orally to our salesmen, and afterwards they countermand them before shipment is made. Sometimes they do not give any

reason; simply say, please countermand our order given at such and such a time.

Q. 196. The point I wanted your answer to was, whether or not there is any usage or custom which authorizes and permits them to do that, before the goods are shipped out by your company?

A. It is a recognized custom, so far as I know, by both sellers and buyers, that it is permissible to have orders countermanded before shipment is made.

Q. 197. Now, how long has that been the course of the business and the usage?

A. Well, it has been my observation ever since I have been in business.

Q. 198. In point of fact, Mr. Coons, has that been practiced upon you and your company?

A. Yes, sir.

Cross-examination.

By Mr. CATES, Attorney-General:

Q. 199. Mr. Coons, where do you live now?

A. Louisville, Kentucky.

Q. 200. What is your address there?

A. My business address is care of the Standard Oil Company.

Q. 201. What is the address of the Standard Oil Company in Louisville, Kentucky?

A. Fifth and Bloom Streets.

Q. 202. That is the location of the main office in Louisville, which is under your control?

A. Yes, sir.

Q. 203. That is where the books and papers of the company are kept?

A. Yes, sir.

230 Q. 204. I mean, the books and papers pertaining to the territory under your jurisdiction?

A. Yes, sir.

Q. 205. As I understand it, there was a special agency for the Standard Oil Company, at Louisville, in 1903, under your charge?

A. Yes, sir.

Q. 206. The territory so under your charge as special agent in 1903 was entirely separate and distinct from the territory under the charge of J. E. Comer, the special agent of the defendant Standard Oil Company, located at Nashville, was it not?

A. Yes, sir.

Q. 207. And you had nothing whatsoever to do with the territory under the charge of Mr. Comer in 1903?

A. No, sir.

Q. 208. We are speaking of the defendant, Standard Oil Company. That is a corporation, is it not?

A. Yes, sir.

Q. 209. Under the laws of what State is it incorporated?

A. Kentucky.

Q. 210. What connection has it with what is called and commonly known as the Standard Oil Company of New Jersey?

A. That I don't know; just the relations that exist.

Q. 211. It does have relations with that Standard Oil Company of New Jersey, does it not?

A. So far as I know myself, I would say I cannot say. I don't know.

Q. 212. You didn't make any reports beyond the Cincinnati or Covington office?

A. No, sir.

Q. 213. Where was the chief office of the Standard Oil Company of Kentucky in 1903?

A. Well, the general office to which point the special agents reported was then in Cincinnati.

Q. 214. When was it moved to Covington, Kentucky?

A. I think about December 1, or some time during December, 1903.

Q. 215. Do you know why it was moved over to Kentucky?

A. No, sir; I do not.

Q. 216. It was after the State of Ohio had commenced proceedings against the Standard Oil Company in that State?

A. Well, now, I am not posted as to the time those proceedings were instituted.

Q. 217. Don't you know that more than a year ago the State of Ohio began proceedings against the Standard Oil Company?

A. I know there was something of the kind, from newspaper reports, but I was never told by any of our officials at the general office anything in connection with it, or why the general office was moved to Covington.

Q. 218. In 1903 Mr. J. E. Comer, special agent or superintendent for the Standard Oil Company in the territory of which the center or chief office seemed to be Nashville, had full control of that territory, did he not?

A. He had full control in this respect: he was manager—superintendent, or, as we term it, the special agent, but he worked under the directions of the general office.

Q. 219. So did all special agents or superintendents work under the control of the corporation itself, did they not?

A. Yes, sir; under our general office at Cincinnati.

Q. 220. This Mr. C. T. Collings, you say, at that time was second vice-president of the Standard Oil Company?

A. Yes, sir.

Q. 221. He was also its active manager, was he not?

A. Yes, sir.

Q. 222. Was that one of the titles of his office?

A. Not general manager. He had supervision of the direction of the business, the fixing of prices, etc. There was a general manager who looked after, and at the present time does look after, the physical conditions, mainly, of the company, such as repairing and building plants, locating storage tanks, giving orders for tank wagons, etc.

Q. 223. Who was president of the company at that time?

A. Of the Standard Oil Company of Kentucky?

Q. 224. Yes.

A. Well, now; I am not positive, but I believe that it was C. H. Pratt.

Q. 225. Where does he live?

A. I don't know where he lives. I never met the gentleman, and this is merely the knowledge I have on the outside of the business. I have never had any communication in any way with Mr. Pratt; never saw him, but I have always understood—that is, for the past several years—that Mr. C. H. Pratt was the president of the Standard Oil Company of Kentucky.

Q. 226. Do you know whether or not he lives in New York?

A. I do not.

Q. 227. Who was first vice-president?

A. Mr. Wescott.

Q. 228. What are his initials?

A. H. G. Wescott.

Q. 229. Where does he live, or did he live?

A. As I understand, he has an office in New York, but
232 whether he makes that his home or lives in Jersey City or some adjacent city there, I don't know.

Q. 230. Whereabouts is his office in New York?

A. His office, I understand, is at No. 206 Broadway.

Q. 231. Mr. Pratt has an office there also?

A. I don't know.

Q. 232. Now, Mr. Coons, you don't know of your own knowledge what instructions Mr. Collings, in 1903, had given to Mr. Comer as the special agent or superintendent in the Nashville district, do you?

A. No, I do not know; I only know the custom that has always existed in the past and up to the present time.

Q. 233. You don't know what authority Mr. Comer had conferred upon him during the year 1903, do you?

A. No, sir.

Q. 234. Then, of your personal knowledge, you are unable to state what he was authorized to do in the Nashville district, are you not?

A. No, sir; I don't know.

Q. 235. Now, Mr. Coons, you say that Mr. Comer continued in charge of the Nashville district—by the way, this territory here was called the Nashville district, wasn't it?

A. Yes, sir.

Q. 236. He continued in charge of it until his death in October, 1906?

A. Yes, sir.

Q. 237. And then others were temporarily in charge until the first of January, 1907?

A. Yes, sir.

Q. 238. And on the first of January, 1907, the Nashville agency, or Nashville district, as being a separate district in charge of a separate special agent or superintendent, was abolished, was it?

A. Yes, sir.

Q. 239. And the Nashville district was tied on to the Louisville district?

A. Certain portions of it.

Q. 240. The Nashville office and the Gallatin office were attached to the Louisville district, were they not?

A. Yes, sir.

Q. 241. I assume that when that was done, all the books and records and papers pertaining to the Nashville business or the Nashville district agency, were removed to the office at Louisville, Kentucky?

A. No, sir.

Q. 242. Where are they?

233 A. I don't know; I suppose that they were sent to Covington, to the general office.

Q. 243. You have not them under your control, then?

A. No, sir.

Q. 244. Now, since you don't know what authority was conferred upon Mr. Comer in the Nashville district in 1903, you don't know what authority he was assuming to exercise, do you?

A. No, sir; I do not.

Q. 245. You don't know what authority he exercised in relation to the fixing of prices, do you?

A. I know this: the authority that was conferred on me and the policy of the company in reference to fixing prices that they would not make exceptions with one agency over another.

Q. 246. But, as a matter of fact, you don't know whether they did make such exception in favor of Mr. Comer, do you, Mr. Coons?

A. No; I don't know, personally.

Q. 246½. Nobody could speak about that authority at this time except Mr. Collings, could they?

A. I think not.

Q. 247. Then you don't know what arrangements were being made by the Standard Oil Company through its special or other agents, in the Nashville district in 1903 in relation to driving competition out of this district, do you?

A. No, sir; I didn't keep in touch with the general conditions that existed.

Q. 248. Then you don't know whether they were in the habit of giving away oil down here in this district, to secure the countermand of orders, or not?

A. I only know the instructions to the agents and the customs that have always existed.

Q. 249. You know what instructions you had in your district at that time?

A. Yes, sir.

Q. 250. But you don't know what instructions Mr. Comer had in the Nashville district, personally?

A. No, sir.

Q. 251. Then you don't know, further, what Mr. Comer and his

agents were doing down here in the Nashville district in efforts to drive out competition from this territory?

A. No, sir.

Q. 252. What competitors had the Standard Oil Company down here in the Nashville district in 1903?

A. Well, I mentioned the competitors that occurred to me at the moment that existed at the present time. Now, I do not believe that the Gulf Refining Company was doing business in Tennessee or Kentucky in 1903.

234 Q. 253. What other companies were in Nashville at that time?

A. In Nashville?

Q. 254. Doing business in the Nashville district?

A. Well, the company at Evansville, the Evansville Oil Company.

Q. 255. In regard to the Evansville Oil Company, do you know that it was doing any more business than its ineffectual effort to do business in Sumner County, in October, 1903?

A. I don't know just what business it was doing in the Nashville district, for the reason that it was not under my supervision at that particular time, but I do know they were operating out of Evansville, coming over into Kentucky and doing business, and, I understand, coming into Tennessee.

Q. 256. Do you know that they were coming into Tennessee other than their effort in Gallatin in October, 1903?

A. I do not know of the other places; no, sir.

Q. 257. Now, what other companies besides the Evansville Oil Company in 1903?

A. Well, the Consumers' Oil Company, of Louisville, and the Stoll Oil Company?

Q. 258. Did they have traveling men in the Nashville district at the time, of your own knowledge?

A. I don't know to what extent.

Q. 259. Do you know whether they had any in the Nashville district at all in 1903?

A. No; I don't know that they were. I know they were doing business in Louisville, Kentucky, coming out from Louisville, and naturally would suppose they came into Tennessee, as well as Kentucky.

Q. 260. But whether they came to Tennessee or not, you don't know?

A. No, sir.

Q. 261. And you don't know what arrangement the defendant, Standard Oil Company, had with those two companies to keep them out of Tennessee or Kentucky, do you?

A. I don't know of any arrangement; if there was any arrangement, I would certainly know.

Q. 262. Do you mean to say you would know about all arrangements affecting the Nashville district?

A. Not the Nashville district; I am talking about any arrangement existing with those companies.

Q. 263. I am asking about any arrangement that they may have had with those companies affecting the Nashville district, and you had nothing to do with anything of that sort, did you?

A. No, sir.

235 Q. 264. All that you would have personal knowledge of, would be the Louisville or Kentucky district?

A. Yes, sir.

Q. 265. Now, what other companies can you call to mind?

A. I don't recall any other companies.

Q. 266. When you were here in Nashville, the Gulf Refining Company did not have an office or agency here, did it?

A. No, sir.

Q. 267. What other oil companies were doing business or had offices here?

A. The Miller Oil Works and the Cassetty Oil Company.

Q. 268. Was the Miller Oil Company a corporation?

A. I don't know whether it was a corporation or a company.

Q. 269. Who was at the head of that concern?

A. The local manager was Mr. John Miller.

Q. 270. Do you know where he is now?

A. I do not. I think he is at Oil City, Pennsylvania.

Q. 271. With what company?

A. With the Miller Oil Works, at that place.

Q. 272. That is one of the subsidiary corporations connected with the Standard Oil Company?

A. I don't know anything about that. I should say no, so far as my knowledge goes.

Q. 273. Then do not answer further than your knowledge goes. Then, you say there was the Cassetty Oil Company here at that time?

A. Yes, sir.

Q. 274. Who was at the head of that concern?

A. Mr. McIlwaine.

Q. 275. Do you remember his name?

A. I don't remember his initials just now.

Q. 276. Mr. James R. McIlwaine?

A. J. R. McIlwaine—I believe those are his initials.

Q. 277. What connection did the Cassetty Oil Company have with the Standard Oil Company when you lived here in 1902?

A. They had none, so far as I know.

Q. 278. Do you mean to say that you, as special agent of the Standard Oil Company, knew of no sort of relations or contracts between the Standard Oil Company and the Cassetty Oil Company in 1902?

A. Yes, sir; I didn't know of any.

Q. 279. If any such was made, you don't know about it?

A. No, sir.

Q. 280. You don't mean to say no contract did exist between them?

236 A. I do not.

Q. 281. Well, what others were here? Was the Greener Oil Company doing business here then?

A. No, sir; Mr. Greener was in the drug business when I was here.

Q. 282. Then, you have mentioned all the oil companies that were doing business here at that time?

A. As far as I remember.

Q. 283. You said that the general custom of the Standard Oil Company was to have prices fixed by its vice-president, Mr. Collings—is that correct?

A. No, not the general custom; it is the custom absolutely.

Q. 284. You don't know, of your own knowledge, whether there are any exceptions to that?

A. I never heard of any.

Q. 285. Then you don't know whether there are any exceptions?

A. No, sir.

Q. 286. I assume that Mr. Collings fixes the prices upon the information which his special agents or district superintendents furnished him, did he?

A. That is not my knowledge. He fixes the prices, it has been the custom, under my observation, according to the price which is paid by the Standard Oil Company for the products which it markets.

Q. 287. Who fixes those prices?

A. How is that?

Q. 288. Yes, the prices to you.

A. Well, the prices, as far as I am concerned, are fixed by Mr. Collings.

Q. 289. Who fixes the prices to him?

A. That I don't know.

Q. 290. Where do you get your oil from?

A. We get it from various points. The purchasing is not done through the special agent.

Q. 291. Don't you know, as a matter of fact, that the defendant, Standard Oil Company, gets its supplies of oil from the Standard Oil Company of New Jersey?

A. No; I don't know that.

Q. 292. Or the corporations controlled by the Standard Oil Company of New Jersey?

A. Well, I would say that I do not know absolutely how that is managed. I know that most of the oil for this district comes from Whiting, Indiana. Whether the refinery at Whiting, Indiana, is a separate incorporated company, and who owns the stock of that refinery, I don't know.

237 Q. 293. Don't you know it owns that? Don't you know that it is owned by the Standard Oil Company of New Jersey and financed by people connected with the Standard Oil Company?

A. I don't know whether that is a fact or not. I don't know whether individual parties own a majority, or whether the Standard Oil Company of New Jersey or Montana owns it, or who.

Q. 294. What part of the State is Whiting in?

A. It is in the northern part of the State.

Q. 295. Upon what line or lines of railroad?

A. That I don't know; I never looked it up; it is out a short distance from Chicago.

Q. 296. Well, what part does the freight have in fixing the price of oil at any given locality?

A. It has a good deal to do with it. If the freight rate, for example, is one cent and to another point it is two cents, then the selling price is fixed and based upon the cost of the oil laid down at such points.

Q. 297. Where do you get that information from?

A. Well, I know it from my own experience and observation, and from discussing matters with Mr. Collings, who does fix the price.

Q. 298. You know where Clarksville, Tennessee, is, do you not?

A. Yes, sir.

Q. 299. Upon what line of railroad is that?

A. It is on the L. & N. R. R.

Q. 300. Was in 1903?

A. Yes, sir.

Q. 301. Upon what line of railroad is Gallatin?

A. L. & N. R. R.

Q. 302. Both on main stems of the L. & N. R. R.?

A. Yes, sir; one coming to Nashville and the other one going through to Memphis.

Q. 303. And both about equal distance from Whiting, Indiana?

A. I would say about equal distance. I don't know the exact distance.

Q. 304. These prices which you have set out on these various exhibits are prices at certain designated times, of oil issued to merchants or consumers from tank wagons, are they not?

A. Yes, sir.

Q. 305. Now, what was the selling price of oil during the year 1903 at Clarksville, from tank wagons?

A. January 1, 13 cents; June 1, 12½ cents; October 20, 13 cents; October 26, 14½ cents.

Q. 306. Can you tell me why there was an increase of 1½ cents per gallon at Clarksville, from October 20, 1903, to October 26, 1903?

A. No, sir.

Q. 307. Can you tell me why, on June 1, 1903, coal oil from tank wagons should be selling at 12½ cents per gallon at Clarksville, and 13½ cents per gallon at Gallatin?

A. No, sir; I don't know.

Q. 308. Mr. Coons, what were the ruling prices, or prices fixed by the Standard Oil Company, for the sale of its oil throughout the year 1903, at Algood, Putnam County, Tennessee, where, according to this statement you have furnished here, it had one tank wagon?

A. Well, in getting up these prices we did not take every town in the Nashville district; we took it promiscuously and didn't think it was necessary to take every town. I could get the information.

Q. 309. I will ask you to make it out upon the same plan as Exhibits Nos. 1, 2, 3, etc., are made out, additional exhibits, showing prices of tank oil during the year 1903, 1904, 1905, and 1906,

at what you have named as Tennessee bulk stations, formerly in the Nashville district, and set out in answer to a previous answer on direct examination, such as Algood, Athens, Bear Springs, etc., and also include in such statement the price of barrel oil at those stations, in the same manner and plan as they are set out on page 26 of the printed answer of the defendant company, that is, the price of oil in tank wagons, in one line, and the price of barrel oil in another line.

A. All right; I will do so.

Q. 310. Also file as exhibits, statements showing the price of barrel oil during the year 1903 at what you have, in answer to a question on direct examination, called Tennessee barrel stations, such as Johnsonville, Lexington, Mountain City, Newport, Rogersville, Watertown and Cookeville.

A. I will do so.

Q. 311. Mr. Coons, do you know what rebates, during the year 1903, the defendant, Standard Oil Company, was receiving from the Louisville & Nashville Railroad Company, or any other railroad, for oil shipped to points within the Nashville district?

A. No, sir; I do not. I would say, to my personal knowledge, that they did not receive any.

Q. 312. Do you know, of your personal knowledge, that they did not receive any?

A. No, sir; I do not.

Q. 313. Then you don't know how much they may have received, do you?

A. No, sir; I don't know a thing about that.

239 Q. 314. Now, I would judge from this statement which appears on page 26 of the printed answer of the defendant, that ordinarily the price of barrel oil ranges from two cents up, over the price of tank oil, does it not?

A. Yes. Do you want me to answer why that is?

Q. 315. You may, if you wish to do so.

A. Barrels, at the present time—that is, second-hand coal oil barrels—cost from \$1.20 to \$1.30 each. The average barrel will hold fifty gallons. A barrel at \$1.30 would be equivalent to 2½ cents a gallon. This barrel has to be coopered and glued and prepared to receive oil, which adds to the cost of barrel oil over tank wagon oil. I mean by glued, that ordinary commercial glue is mixed with water and heated to a boiling point and about half a gallon to a barrel of this heated glue is poured into the bung of the barrel and the barrel is then moved about so as to spread the glue over the inside surface of the barrel, and the barrel then is put on a rack or trough, and all of the heated glue that has not adhered to the wood runs out, and then the barrel is allowed to stand for some hours and is then ready to be filled with oil.

Q. 316. All that has to do with the efforts to prevent leakage?

A. Yes, sir.

Q. 317. Now, if a barrel is put at a dollar each, that means practically two cents a gallon?

A. Yes, sir.

Q. 318. Nashville is further south from Whiting, Indiana, than Gallatin or Clarksville, isn't it?

A. Yes, sir.

Q. 319. How much farther south?

A. About twenty-eight to thirty miles south of Gallatin.

Q. 320. How much south of Nashville is Franklin?

A. I don't know the distance there?

Q. 321. About twenty miles.

A. I should say about twenty or twenty-two miles.

Q. 322. Have you any documents with you that would show, so as not to delay me in waiting for the exhibits for which I have asked, the prices of oil at Algood and Cookeville and Watertown in 1903?

A. No, sir; I have not that with me.

Q. 323. Then you cannot speak from your own personal knowledge, at this time, what the price of oil in Putnam and James and Fentress Counties was in 1903?

A. No, sir.

Q. 324. What is the capital stock of the defendant, Standard Oil Company, Mr. Coons?

A. I don't know. The capital stock of the Standard Oil Company, that is a matter of record, but I don't remember what it is.

240 Q. 325. Now, we were talking awhile ago about the cost of barrels. Tank wagons cost money, too, don't they?

A. Yes, sir.

Q. 326. What does an ordinary tank wagon cost?

A. Well, it depends on the capacity of a tank wagon. A tank wagon, new from the shops, of, say 210 to 250 gallons, I should judge, would cost about \$225 to \$250.

Q. 327. These tank wagons are hauled around over the country by horses and mules?

A. Yes, sir.

Q. 328. They cost money?

A. Yes, sir.

Q. 329. You have to have a driver with each one?

A. Yes, sir.

Q. 330. What do you ordinarily pay these drivers?

A. About \$45 a month, at smaller places. Most of these substations are handled on what we term a commission basis. The sub-agent receives so much per gallon for all the oil he delivers in his town, and in that immediate circuit which he goes to. He furnishes his town team, and we furnish only the tank wagon.

Q. 331. Does he pay the driver that goes around over the country?

A. Yes, either drives himself or pays the driver.

Q. 332. Do you know whether or not that particular arrangement existed in Gallatin in 1903?

A. Yes, sir.

Q. 333. How much was Rutherford, your agent, getting per month at that time?

A. I don't know.

Q. 334. What have you at Gallatin in the way of equipment—I mean, did you have in 1903?

A. The exhibit shows the number of wagons there—I think, one; and the storage tanks, I think there were perhaps two. I don't know the number of storage tanks that were there—I don't remember.

Q. 335. What was the capacity of those storage tanks?

A. I don't know that.

Q. 336. Did you ever see them?

A. Oh, I have seen them in passing by there. I don't know whether there was any additional tanks put up there since I left there or not. As I remember, when I was special agent at this point, there was one storage tank.

Q. 337. And there are two there now?

A. I believe there are, but I would not be positive.

Q. 338. Please tell us what was the capacity of the storage tank or tanks at Gallatin in October, 1903?

241 A. I don't know. I haven't that information.

Q. 339. Can you procure that information?

A. Why, I think so.

Q. 340. Please do so, and insert it as an answer to this question.

A. I will do so. Three tanks; capacity, 370 barrels.

Q. 341. How much oil was in the storage tank at Gallatin as reported on the first day of October, 1903? How much was in the storage tank as reported on the first day of November, 1903? How much was in the storage tank on the first day of December, 1903?

A. I don't know.

Q. 342. Can't you procure that information?

A. I think so.

Q. 343. Please do so, and give it as your answer to this question before closing your deposition.

A. I will endeavor to get the information.

Stock on hand October 1, 1903.....	15,363 gallons.
Stock on hand November 1, 1903.....	13,048 gallons.
Stock on hand December 1, 1903.....	9,529 gallons.

Redirect examination.

By Mr. VERTREES, for defendant:

Q. 344. Nashville and Clarksville are on the Cumberland River, are they not, Mr. Coons?

A. Yes, sir.

Q. 345. Is that river traversed by boats in the carrying trade?

A. Yes, sir.

Q. 346. Was it in 1903?

A. Yes, sir.

Q. 347. Isn't it true that Nashville is a central city, where various roads converge, and Clarksville, Franklin and Gallatin are small towns on those roads you have mentioned, at the distances you have mentioned from Nashville?

A. Yes, sir.

Recross-examination.

By Mr. CATES, Attorney-General:

Q. 348. Where is O'Donnel Rutherford at this time?

A. He is at Silver City, New Mexico.

Q. 349. Do you know of your own personal knowledge whether he is largely indebted to the Standard Oil Company?

A. I don't know. I don't think so.

242 Q. 350. But you don't know?

A. No, I don't know. I never heard of it.

Q. 351. Where is Mr. C. E. Holt?

A. He is at Skiatook, Oklahoma.

Q. 352. You have been in correspondence with him?

A. Yes, sir.

Q. 353. In whose employment is C. E. Holt at this time?

A. He was sub-agent at Huntsville until a short time ago, and his wife was with her relatives out in Indian Territory, and he reported that she was very seriously ill, and he resigned and went out there, and is not in our employ.

Q. 354. Huntsville, Ala.?

A. Yes, sir.

Q. 355. When did he leave the employ of the defendant, Standard Oil Company?

A. Well, I should say about a month ago; I don't remember just when. Huntsville is being looked after by Memphis.

Q. 356. Now, you say that in the fall of 1903, C. E. Holt was a salesman in this territory under Mr. Comer?

A. Yes, sir.

Q. 357. After that he was promoted to take charge of the station at Huntsville, Alabama, was he?

A. He remained a salesman until, I should say, perhaps along in March, February, or March of this year. He was under my direction after the first of January.

Q. 358. Under your direction up in Kentucky.

A. Yes, sir; he traveled here in Tennessee and some few points in Kentucky.

Q. 359. And then he was promoted to take charge of the agency at Huntsville?

A. He was not promoted; he said he would like to get located at a point where he could be at home.

Q. 360. Was that his home?

A. No, sir. Where he could have a home and be with his family.

Q. 361. How much were you paying him at Huntsville?

A. Paying him the same he was getting when he was traveling; if I remember right it was seventy or seventy-five dollars a month, I don't know which.

Q. 362. Did you have charge or supervision of the Huntsville agency?

A. No, sir.

Q. 363. Then you don't know how much he is being paid there?

A. No, but I know the question came up of his going to Hunts-

ville, and I told him I understood they needed a man at Huntsville, and my information was they were paying the same at Huntsville as he was getting on the road. Huntsville is comparatively a small town, not very much business done out of there.

Q. 364. Did the payment of Holt's fine and costs of the prosecution against him come through you?

A. No, sir.

Q. 365. You know, do you not, that the Standard Oil Company paid those fines and the costs of prosecution?

A. I understand that they did.

Q. 366. Do you know from what office they did come?

A. No, I do not. But I should say from the Covington office.

Q. 367. Wasn't it the New York Office?

A. I absolutely don't know.

Q. 368. Has the defendant, the Standard Oil Company, an office in New York?

A. Not the Standard Oil Company of Kentucky, to my knowledge.

Q. 369. You don't know whether the Standard Oil Company of Kentucky has an office at No. 26 Broadway?

A. No, sir.

Q. 370. But its first vice-president, Mr. Westcott, has an office there?

A. Yes, sir; he has an office, as I understand, there at No. 26 Broadway.

Q. 371. In whose employ is Rutherford now?

A. I don't know. He is not in the Standard Oil Company's as far as I know. I don't know what he is doing.

Q. 372. When did he leave the services of the Standard Oil Company approximately?

A. I would say something over a year ago. Here it is right here; he left December 18th, 1905.

Q. 373. Why did he leave the employ of the Standard Oil Company?

A. I understood it was on account of his health; had very poor health.

Q. 374. Haven't you also understood it was because he was short with the Standard Oil Company?

A. No, I never did; never understood that he was short with the Standard Oil Company, except at this particular *line* in 1903, when it was deducted from his commission.

Q. 375. Personally you don't know anything about that?

A. No, I don't know anything more about that than what I have heard.

Q. 375. Now, is Mr. Holt in any way connected with the Standard Oil Company at this time?

A. No, sir.

244 Q. 377. Have you given him letters of introduction to parties in the Indian Territory?

A. Not that I know of.

Q. 378. Has he applied to you for letters of recommendation and introduction?

A. Not to me.

Q. 379. Do you know whether or not he has to any one else?

A. No, sir.

Q. 380. What is the name of the Mr. Wilson in charge of your business here?

A. Mr. T. P. Wilson.

Q. 381. He was an official under Mr. Comer in 1903, was he not, Mr. Coons?

A. No, sir.

Q. 382. When did he come here?

A. January 1st, 1907.

Q. 383. Wasn't Mr. Wilson here in 1903?

A. No, sir.

Q. 384. Who was with Mr. Comer here?

A. Mr. Radcliffe and Mr. S. P. Wilson.

Q. 385. Where is he?

A. He is here in the city?

Further this deponent saith not.

Signature of witness waived, stenographer and Notary Public to sign in his stead.

BUFORD DUKE,

Stenographer and Notary Public.

EXHIBIT NO. 1 TO DEPOSITION OF S. W. COONS.

MEMORANDUM OF PRICES ON FIREPROOF OIL IN BARRELS AND FROM TANK WAGON DURING THE YEAR 1903 AT TENNESSEE STATIONS.

Algood, Tenn.

Date	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03
Price					
T. W.					
Bbls.	18.50c	18.00c	17.50c	18.00c	19.00c

Athens, Tenn.

Date ..	1-1-03	4-27-03	6-5-03	10-21-03	10-26-03	12-3-03
Price						
T. W. ...	15.50c	15.00c	14.50c	15.00c	16.00c	16.50c
Bbls. ...	17.50c	17.00c	16.50c	17.00c	18.00c	18.50c

245

Bear Springs, Tenn.

Date	1-1-03	6-1-03	10-20-03	10-26-03
Price				
T. W.	13.50c	13.00c	13.50c	15.00c
Bbls.				

Brownsville, Tenn.

Date ..	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	11-16-03
Price						
T. W. ...	15.50c	14.50c	14.00c	14.50c	15.50c	16.00c
Bbls. ...	18.00c	17.00c	16.50c	17.00c	18.00c	18.50c

Chattanooga, Tenn.

Date...	1-1-03	4-27-03	6-5-03	10-20-03	10-24-03	11-20-03
Price						
T. W. ...	13.50c	13.50c	13.00c	13.50c	14.50c	15.00c
Bbls. ...	16.50c	16.00c	15.50c	16.00c	17.00c	17.50c

Clarksville, Tenn.

Date	1-1-03	6-1-03	10-20-03	10-26-03	
Price					
T. W.	13.00c	12.50c	13.00c	14.50c	
Bbls.	15.00c	14.50c	15.00c	16.50c	

Cleveland, Tenn.

Date	1-1-03	6-5-03	10-20-03	10-24-03	11-20-03
Price					
T. W.	15.00c	14.50c	15.00c	16.00c	16.50c
Bbls.					

Coal Creek, Tenn.

Date	1-1-03	3-25-03	4-23-03	10-27-03	
Price					
T. W.	14.00c	13.50c	12.50c	13.50c	
Bbls.	16.00c	15.50c	14.50c	15.50c	

Columbia, Tenn.

Date	1-1-03	2-21-03	10-20-03	10-24-03	11-20-03
Price					
T. W.	15.00c	14.00c	14.50c	15.50c	16.00c
Bbls.	17.00c	16.00c	16.50c	17.50c	18.00c

Corvinton, Tenn.

Date ..	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	11-16-03
Price						
T. W. ...	15.00c	14.00c	13.50c	14.00c	15.00c	15.50c
Bbls. ...	17.50c	16.50c	16.00c	16.50c	17.50c	18.00c

246

Danville, Tenn.

Date ..	1-1-03	3-26-03	5-8-03	6-16-03	10-20-03	10-26-03
Price						
T. W.—(No tank wagon price in effect).						
Bbls. ...	16.50c	16.00c	15.50c	15.00c	15.50c	17.00c

Dayton, Tenn.

Date...	1-1-03	3-25-03	4-5-03	10-20-03	10-24-03	11-20-03
Price						
T. W.						
Bbls. ...	16.00c	16.50c	16.00c	16.50c	17.50c	18.00c

Dickson, Tenn.

Date ..	1-1-03	4-27-03	6-5-03	10-20-03	10-24-03	12-3-03
Price						
T. W. ...	15.00c	14.50c	14.00c	14.50c	15.50c	16.00c
Bbls. ...	17.00c	16.50c	16.00c	16.50c	17.50c	18.00c

Dyersburg, Tenn.

Date .	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	11-16-03
Price						
T. W. . .	15.00c	14.00c	13.50c	14.00c	15.00c	15.50c
Bbls. . .	17.50c	16.50c	16.00c	16.50c	17.50c	18.00c

Erin, Tenn.

Date	1-1-03	6-1-03	10-20-03	10-26-03	
Price					
T. W.	14.00c	13.50c	14.00c	15.50c	
Bbls.					

Fayetteville, Tenn.

Date	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03
Price					
T. W.	16.00c	15.50c	15.00c	15.50c	16.50c
Bbls.	18.00c	17.50c	17.00c	17.50c	18.50c

Franklin, Tenn.

Date	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03
Price					
T. W.	14.50c	14.00c	13.50c	14.00c	15.00c
Bbls.	16.50c	16.00c	15.50c	16.00c	17.00c

Gallatin, Tenn.

Date	1-1-03	4-28-03	6-5-03	10-27-03	
Price					
T. W.	14.50c	14.00c	13.50c	14.50c	
Bbls.	16.50c	16.00c	15.50c	16.50c	

247

Greeneville, Tenn.

Date . .	1-1-03	4-28-03	6-5-03	10-21-03	10-26-03	11-20-03
Price						
T. W. . .	14.50c	14.00c	13.50c	14.00c	15.00c	15.50c
Bbls. . .	17.00c	16.50c	16.00c	16.50c	17.50c	18.00c

Harriman, Tenn.

Date . .	1-1-03	4-28-03	6-5-03	10-20-03	10-27-03	11-27-03
Price						
T. W. .	15.00c	14.50c	14.00c	14.50c	15.00c	15.50c
Bbls. .	17.00c	16.50c	16.00c	16.50c	17.00c	17.50c

Humboldt, Tenn.

Date . .	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	11-16-03
Price						
T. W. .	14.50c	13.50c	13.00c	13.50c	14.50c	15.00c
Bbls. .	17.00c	16.00c	15.50c	16.00c	17.00c	17.50c

Jackson, Tenn.

Date . .	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	11-16-03
Price						
T. W. .	14.50c	14.00c	13.50c	14.00c	15.00c	15.50c
Bbls. .	16.50c	16.00c	15.50c	16.00c	17.00c	17.50c

Johnson City, Tenn.

Date..	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03	12-31-03
Price						
T. W..	14.00c	13.50c	13.00c	13.50c	14.50c	15.00c
Bbls..	16.00c	15.50c	15.00c	15.50c	16.50c	17.00c

Jellico, Tenn.

Date.....	1-1-03	6-5-03	10-20-03	10-24-03	11-20-03
Price					
T. W.....	13.00c	12.50c	13.00c	14.00c	14.50c
Bbls.	14.50c	14.00c	14.50c	15.50c	16.00c

Knoxville, Tenn.

Date..	1-1-03	4-28-03	6-5-03	10-20-03	10-27-03	11-20-03
Price						
T. W..	14.50c	14.00c	13.50c	14.00c	14.50c	15.00c
Bbls..	17.00c	16.50c	16.00c	16.50c	17.00c	17.50c

Lawrenceburg, Tenn.

Date..	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03	11-20-03
Price						
T. W..	15.00c	14.50c	14.00c	14.50c	15.50c	16.00c
Bbls..	18.00c	17.00c	16.50c	17.00c	18.00c	18.50c

248

Lebanon, Tenn.

Date..	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03	11-20-03
Price						
T. W..	14.50c	14.00c	13.50c	14.00c	15.00c	15.50c
Bbls..	17.00c	16.00c	15.50c	16.00c	17.00c	17.50c

Lewisburg, Tenn.

Date	1-1-03	10-21-03	10-24-03	11-20-03
Price				
T. W.	14.50c	15.00c	16.00c	16.50c
Bbls.	16.50c	17.00c	18.00c	18.50c

Martin, Tenn.

Date..	1-1-03	1-29-03	4-20-03	6-1-03	10-20-03	10-26-03
Price						
T. W..	14.00c	14.00c	13.50c	13.00c	13.50c	15.00c
Bbls..	16.50c	16.00c	15.50c	15.00c	15.50c	17.00c

McKenzie, Tenn.

Date..	1-1-03	4-28-03	6-5-03	10-21-03	10-24-03	11-20-03
Price						
T. W..	15.00c	14.50c	14.00c	14.50c	15.50c	16.00c
Bbls..	17.00c	16.50c	16.00c	16.50c	17.50c	18.00c

McMinnville, Tenn.

Date..	1-1-03	4-28-03	6-5-03	10-21-03	10-26-03	12-3-03
Price						
T. W..	16.00c	15.50c	15.00c	15.50c	16.50c	17.00c
Bbls..	18.00c	17.50c	17.00c	17.50c	18.50c	19.00c

Memphis, Tenn.

Date..	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	11-16-03
Price						
T. W..	11.00c	10.50c	10.00c	10.50c	11.50c	12.50c
Bbls...	14.50c	14.00c	13.50c	14.00c	15.00c	15.50c

Morristown, Tenn.

Date..	1-1-03	4-27-03	6-5-03	10-20-03	10-24-03	11-20-03
Price						
T. W..	15.50c	15.00c	14.50c	15.00c	16.00c	16.50c
Bbls...	17.50c	17.00c	16.50c	17.00c	18.00c	18.50c

Murfreesboro, Tenn.

Date.....	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03	
Price						
T. W.....	15.00c	14.50c	14.00c	14.50c	15.50c	
Bbls.....	17.00c	16.50c	16.00c	16.50c	17.50c	

249

Nashville, Tenn.

Date.....	1-1-03	4-27-03	6-8-03	10-20-03	10-24-03	
Price						
T. W.....	13.50c	13.00c	12.50c	13.00c	14.00c	
Bbls.....	16.00c	15.50c	15.00c	15.50c	16.50c	

Obion, Tenn.

Date.....	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	
Price						
T. W.....	15.00c	14.00c	13.50c	14.50c	15.50c	
Bbls.....	17.00c	16.00c	15.50c	16.50c	17.50c	

Paris, Tenn.

Date.....	1-1-03	4-24-03	6-1-03	10-20-03	10-26-03	
Price						
T. W.....	14.00c	13.50c	13.00c	13.50c	15.00c	
Bbls.....	16.00c	15.50c	15.00c	15.50c	17.00c	

Pulaski, Tenn.

Date.....	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03	
Price						
T. W.....	16.50c	16.00c	15.50c	16.00c	17.00c	
Bbls.....	18.50c	18.00c	17.50c	18.00c	19.00c	

Ripley, Tenn.

Date..	1-1-03	4-20-03	6-1-03	10-21-03	10-26-03	11-16-03
Price						
T. W..	15.00c	14.00c	13.50c	14.00c	15.00c	15.50c
Bbls...	17.00c	16.00c	15.50c	16.00c	17.00c	17.50c

Shelbyville, Tenn.

Date.....	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03	
Price						
T. W.....	16.00c	15.00c	14.50c	15.00c	16.00c	
Bbls.....	17.50c	16.50c	16.00c	16.50c	17.50c	

So. Pittsburg, Tenn.

Date..	1-1-03	1-5-03	6-5-03	10-20-03	10-24-03	11-3-03
Price						
T. W..	15.50c	15.00c	14.50c	15.00c	16.00c	16.50c
Bbls...	17.50c	17.00c	16.50c	17.50c	18.00c	18.50c

Sparta, Tenn.

Date.....	1-1-03	4-28-03	6-5-03	10-21-03	10-26-03
Price					
T. W.					
Bbls.....	19.00c	18.50c	18.00c	18.50c	19.50c

250

Springfield, Tenn.

Date..	1-1-03	4-28-03	6-5-03	7-1-03	10-20-03	10-27-03
Price						
T. W..	15.00c	14.50c	14.00c	13.50c	14.00c	15.00c
Bbls...	17.00c	16.50c	16.00c	15.50c	16.00c	17.00c

Sweetwater, Tenn.

Date..	1-1-03	4-27-03	6-5-03	10-21-03	10-26-03	12-3-03
Price						
T. W..	16.00c	15.50c	15.00c	15.50c	16.50c	17.00c
Bbls.						

Tracy City, Tenn.

Date.....	1-1-03	4-28-03	6-5-03	10-20-03	10-26-03
Price					
T. W.....	17.00c	16.50c	16.00c	16.50c	17.50c
Bbls.					

Tullahoma, Tenn.

Date.....	1-1-03	4-28-03	6-5-03	10-20-03	10-24-03
Price					
T. W.....	16.00c	15.50c	15.00c	15.50c	16.50c
Bbls.....	18.00c	17.50c	17.00c	17.50c	18.50c

Union City, Tenn.

Date.....	1-1-03	4-20-03	6-1-03	10-20-03	10-26-03
Price					
T. W.....	14.00c	13.50c	13.00c	13.50c	15.00c
Bbls.....	16.00c	15.50c	15.00c	15.50c	17.00c

Whiteville, Tenn.

Date—(Station not established until August, 1906).

Price
T. W.
Bbls.

Winchester, Tenn.

Date.....	1-1-03	4-28-03	6-5-03	10-21-03	10-26-03
Price					
T. W.....	16.00c	15.50c	15.00c	15.50c	16.50c
Bbls.					

BARREL STATIONS.

Johnsonville, Tenn.

Date.....	1-1-03	6-5-03	10-20-03	10-24-03
Price				
Bbbs.....	16.00c	15.50c	16.00c	17.00c

251

Lexington, Tenn.

Date..	1-1-03	3-17-03	6-1-03	8-10-03	10-21-03	10-26-03
Price						
Bbbs...	17.00c	16.00c	15.50c	16.00c	16.50c	17.50c
Date.....						11-16-03
Price.....						18.00c

Mountain City, Tenn.

Date... 1-1-03	4-28-03	6-5-03	10-21-03	10-26-03	12-3-03
Price					
Bbbs... 17.00c	16.50c	16.00c	16.50c	17.50c	18.00c

Newport, Tenn.

Date.. 1-1-03	4-28-03	6-5-03	10-21-03	10-26-03	11-20-03
Price					
Bbbs... 18.50c	18.00c	17.50c	18.00c	19.00c	19.50c

Rogersville, Tenn.

Date.. 1-1-03	4-28-03	6-5-03	10-21-03	10-26-03	12-3-03
Price					
Bbbs... 18.00c	17.50c	17.00c	17.50c	18.50c	19.00c

Watertown, Tenn.

Date..... 1-1-03	4-28-03	6-5-03	10-21-03	10-24-03
Price				
Bbbs..... 17.00c	16.50c	16.00c	16.50c	17.50c

Cookeville, Tenn.

Date..... 1-1-03	4-28-03	6-5-03	10-20-03	10-24-03
Price				
Bbbs..... 18.50c	18.00c	17.50c	18.00c	19.00c

MEMORANDUM OF PRICES ON FIREPROOF OIL IN BARRELS AND FROM
TANK WAGON DURING THE YEAR 1904, AT
TENNESSEE STATIONS.

Algood, Tenn.

Date.....	3-8-04	5-25-04	6-21-04
Price: T. W.			
Bbbs.....	18.50c	18.00c	17.50c

Athens, Tenn.

Date.....	3-9-04	5-24-04	6-21-04
Price: T. W.	16.00c	15.50c	15.00c
Bbbs.....	18.00c	17.50c	17.00c

252

Bear Springs, Tenn.

Date.....	1-30-04	7-1-04
Price: T. W.....	14.50c	14.00c
Bbls.....		

Brownsville, Tenn.

Date.....	3-7-04	5-26-04	7-25-04
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....	17.50c	17.00c	16.50c

Chattanooga, Tenn.

Date.....	3-8-04	5-24-04	6-21-04	8-8-04
Price: T. W.....	14.50c	14.00c	13.50c	13.00c
Bbls.....	17.00c	16.50c	16.00c	16.00c

Clarksville, Tenn.

Date.....	1-30-04	7-1-04	11-21-04
Price: T. W.....	14.00c	13.50c	13.00c
Bbls.....	16.00c	15.50c	15.50c

Cleveland, Tenn.

Date.....	3-8-04	5-25-04	6-21-04
Price: T. W.....	16.00c	15.50c	15.00c
Bbls.....			

Coal Creek, Tenn.

Date.....	1-5-04	6-21-04	9-27-04
Price: T. W.....	14.00c	13.50c	13.00c
Bbls.....	16.00c	15.50c	15.00c

Columbia, Tenn.

Date.....	3-8-04	5-24-04	6-21-04	11-17-04
Price: T. W.....	15.50c	15.00c	14.50c	14.00c
Bbls.....	17.50c	17.00c	16.50c	16.50c

Corvington, Tenn.

Date.....	3-7-04	5-26-04	7-25-04
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	17.00c	16.50c	16.00c

Danville, Tenn.

Date.....	3-3-04	5-24-04
Price: T. W.—(No tank wagon price in effect).		
Bbls.....	16.50c	16.00c

Dayton, Tenn.

Date.....	3-9-04	4-20-04	5-25-04	11-26-04
Price: T. W.....				
Bbls.....	17.50c	17.00c	16.50c	16.00c

253

Dickson, Tenn.

Date.....	3-8-04	5-14-04	5-30-04	6-21-04
Price: T. W.....	15.50c	15.00c	14.50c	14.00c
Bbls.....	17.50c	17.00c	16.50c	16.00c

Dyersburg, Tenn.

Date.....	2-20-04	3-7-04	5-26-04	7-25-04
Price: T. W.....	15.00c	14.50c	14.00c	13.50c
Bbls.....	17.50c	17.00c	16.50c	16.00c

Erin, Tenn.

Date.....	1-30-04	7-1-04	8-22-04
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....			

Fayetteville, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	16.00c	15.50c	15.00c
Bbls.....	18.00c	17.50c	17.00c

Franklin, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	16.50c	16.00c	15.50c

Gallatin, Tenn.

Date.....	3-8-04	5-24-04
Price: T. W.....	14.00c	13.50c
Bbls.....	16.00c	16.00c

Greeneville, Tenn.

Date.....	3-9-04	5-4-04	6-21-04
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....	17.50c	17.00c	16.50c

Harriman, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....	17.00c	16.50c	16.00c

Humboldt, Tenn.

Date.....	3-7-04	5-26-04	7-25-04
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	17.00c	16.50c	16.00c

Jackson, Tenn.

Date.....	3-7-04	5-26-04	7-25-04
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....	17.00c	16.50c	16.00c

254

Johnson City, Tenn.

Date.....	3-8-04	5-4-04
Price: T. W.....	14.50c	14.00c
Bbls.....	16.50c	16.00c

Jellico, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	14.00c	13.50c	13.00c
Bbls.....	15.50c	15.00c	14.50c

Knoxville, Tenn.

Date.	2-29-04	4-11-04	5-24-04	6-21-04	8-9-04	12-24-04
Price						
T. W.	14.50c	14.00c	13.50c	12.50c	12.00c	11.50c
Bbls.	17.00c	16.50c	16.00c	15.00c	15.00c	15.00c

Lawrenceburg, Tenn.

Date.			3-9-04	5-25-04	6-21-04
Price: T. W.			15.50c	15.00c	14.50c
Bbls.			18.00c	17.50c	17.00c

Lebanon, Tenn.

Date.			3-8-04	5-24-04	6-21-04
Price: T. W.			15.00c	14.50c	14.00c
Bbls.			17.00c	16.50c	16.00c

Lewisburg, Tenn.

Date.			3-9-04	5-25-04	6-21-04
Price: T. W.			16.00c	15.50c	15.00c
Bbls.			18.00c	17.50c	17.00c

Martin, Tenn.

Date.				2-25-04	7-1-04
Price: T. W.				14.50c	14.00c
Bbls.				16.50c	16.00c

McKenzie, Tenn.

Date.			3-9-04	5-25-04	6-21-04
Price: T. W.			15.50c	14.50c	14.00c
Bbls.			17.50c	16.50c	16.00c

McMinnville, Tenn.

Date.			3-9-04	5-25-04	6-21-04
Price: T. W.			16.50c	16.00c	15.50c
Bbls.			18.50c	18.00c	17.50c

Memphis, Tenn.

Date.		2-26-04	4-4-04	5-26-04	7-25-04
Price: T. W.		12.00c	11.50c	11.00c	10.50c
Bbls.		15.00c	14.50c	14.00c	13.50c

255

Morristown, Tenn.

Date.		3-8-04	5-24-04	6-21-04	11-19-04
Price: T. W.		15.50c	15.00c	14.50c	14.50c
Bbls.		18.00c	17.50c	17.00c	16.50c

Murfreesboro, Tenn.

Date.			3-8-04	5-24-04	6-21-04
Price: T. W.			15.00c	14.50c	14.00c
Bbls.			17.00c	16.50c	16.00c

Nashville, Tenn.

Date.		3-8-04	5-24-04	6-31-04	8-8-04
Price: T. W.		13.50c	13.00c	12.50c	12.00c
Bbls.		16.00c	15.50c	15.00c	15.00c

Obion, Tenn.

Date.....	2-20-04	3-7-04	5-26-04
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....	17.00c	16.50c	16.00c

Paris, Tenn.

Date.....	3-3-04	7-1-04	11-15-04
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	16.50c	16.00c	15.50c

Pulaski, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	16.50c	16.00c	15.50c
Bbls.....	18.50c	18.00c	17.50c

Ripley, Tenn.

Date.....	2-25-04	3-7-04	5-26-04
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....	17.00c	16.50c	16.00c

Shelbyville, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	15.50c	15.00c	14.50c
Bbls.....	17.00c	16.50c	16.00c

So. Pittsburg, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	16.00c	15.50c	15.00c
Bbls.....	18.00c	17.50c	17.00c

Sparta, Tenn.

Date.....	3-9-04	5-25-04	6-21-04
Price: T. W.....			
Bbls.....	19.00c	18.50c	18.00c

256

Springfield, Tenn.

Date.....	3-8-04	5-2-04	5-24-04	11-22-04
Price: T. W.....	14.50c	14.00c	13.50c	13.00c
Bbls.....	16.50c	16.00c	15.50c	15.00c

Sweetwater, Tenn.

Date.....	3-8-04	5-13-04	5-24-04	6-21-04
Price: T. W.....	16.50c	16.00c	15.50c	15.00c
Bbls.....				

Tracy City, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	17.00c	16.50c	16.00c
Bbls.....			

Tullahoma, Tenn.

Date.....	3-8-04	5-24-04	6-21-04
Price: T. W.....	16.00c	15.50c	15.00c
Bbls.....	18.00c	17.50c	17.00c

Union City, Tenn.

Date.....	2-25-04	7-1-04	11-15-04
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	16.50c	16.00c	15.50c

Whiteville, Tenn.

Date—(Station not established until August, 1906).

Price: T. W.
Bbls.*Winchester, Tenn.*

Date.....	3-9-04	5-25-04	6-21-04
Price: T. W.....	16.00c	15.50c	15.00c
Bbls.....			

BARREL STATIONS.

Johnsonville, Tenn.

Date.....	3-9-04	5-25-04	6-21-04
Price: Bbls.....	16.50c	16.00c	15.50c

Lexington, Tenn.

Date.....	3-7-04	5-26-04	7-26-04
Price: Bbls.....	17.50c	17.00c	16.50c

Mountain City, Tenn.

Date.....	3-9-04	5-24-04	10-5-04
Price: Bbls.....	17.50c	17.00c	16.50c

257

Newport, Tenn.

Date.....	3-9-04	4-20-04	5-24-04	6-21-04
Price: Bbls.....	19.00c	18.00c	17.50c	17.00c

Rogersville, Tenn.

Date.....	3-9-04	5-24-04	6-21-04
Price: Bbls.....	18.50c	18.00c	17.50c

Watertown, Tenn.

Date.....	3-9-04	5-24-04	6-21-04
Price: Bbls.....	17.00c	16.50c	16.00c

Cookeville, Tenn.

Date.....	3-8-04	5-25-04	6-21-04
Price: Bbls.....	18.50c	18.00c	17.50c

MEMORANDUM OF PRICES ON FIREPROOF OIL IN BARRELS AND FROM
TANK WAGON DURING THE YEAR 1905, AT
TENNESSEE STATIONS.*Algood, Tenn.*

Date.....	1-19-05	2-17-05	4-25-05
Price: T. W.....			
Bbls.....	17.00c	16.50c	16.00c

Athens, Tenn.

Date.....	1-14-05	1-31-05	4-22-05
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	16.50c	16.00c	15.50c

Bear Springs, Tenn.

Date.....	1-16-05	2-13-05	4-24-05	9-14-05	11-22-05
Price: T. W....	13.50c	13.00c	12.50c	12.00c	12.50c
Bbls.....					

Brownsville, Tenn.

Date.....	1-18-05	2-6-05
Price: T. W.....	13.50c	13.00c
Bbls.....	16.00c	15.50c

Chattanooga, Tenn.

Date.....	1-19-05	3-7-05
Price: T. W.....	12.50c	12.00c
Bbls.....	15.50c	15.00c

Clarksville, Tenn.

Date.....	1-16-05	2-13-05	4-24-05
Price: T. W.....	12.50c	12.00c	11.50c
Bbls.....	15.00c	14.50c	14.00c

258

Cleveland, Tenn.

Date.....	1-14-05	1-26-05	4-25-05	5-26-05
Price: T. W.....	14.50c	14.00c	13.50c	13.00c
Bbls.....				

Coal Creek, Tenn.

Date.....	1-14-05	2-1-05	2-15-05	4-22-05
Price: T. W.....	12.50c	12.00c	11.50c	11.00c
Bbls.....	14.50c	14.50c	14.00c	13.50c

Columbia, Tenn.

Date.....	1-17-05	2-6-05	4-24-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	16.00c	15.50c	15.00c

Covington, Tenn.

Date.....	1-18-05	2-6-05
Price: T. W.....	13.00c	12.50c
Bbls.....	15.50c	15.00c

Danville, Tenn.

Date.....	1-16-05	2-13-05	4-24-05	10-19-05
Price: T. W.—(No tank wagon price in effect).				
Bbls.....	15.50c	15.00c	14.50c	14.50c

Dayton, Tenn.

Date.....	1-19-05
Price: T. W.....	
Bbls.....	15.50c

Dickson, Tenn.

Date.....	1-17-05	2-16-05	4-24-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	15.50c	15.00c	14.50c

Dyersburg, Tenn.

Date.....	1-18-05	2-6-05	
Price: T. W.....	13.00c	12.50c	
Bbls.....	15.50c	15.00c	

Erin, Tenn.

Date.....	1-16-05	2-13-05	4-24-05	9-21-05	11-22-05
Price: T. W....	13.50c	13.00c	12.50c	12.00c	12.50c
Bbls.....					

Fayetteville, Tenn.

Date.....	1-17-05	2-16-05	4-24-05
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	16.50c	16.00c	15.50c

259

Franklin, Tenn.

Date.....	1-11-05	2-16-05	4-24-05
Price: T. W.....	13.00c	12.50c	12.00c
Bbls.....	15.50c	15.00c	14.50c

Gallatin, Tenn.

Date.....	1-17-05	2-22-05	4-24-05
Price: T. W.....	13.00c	12.50c	12.00c
Bbls.....	15.50c	15.00c	14.50c

Greenville, Tenn.

Date.....	1-16-05	2-18-05	4-22-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	16.00c	15.50c	15.00c

Harriman, Tenn.

Date.....	1-18-05	2-16-05	4-25-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	15.50c	15.00c	14.50c

Humboldt, Tenn.

Date.....	1-18-05		
Price: T. W.....	13.00c		
Bbls.....	15.50c		

Jackson, Tenn.

Date.....	2-6-05	4-25-05
Price: T. W.....	13.50c	13.00c
Bbls.....	15.50c	15.00c

Johnson City, Tenn.

Date.....	1-16-05	2-7-05	4-22-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	15.50c	15.00c	14.50c

Jellico, Tenn.

Date.....	1-14-05	2-16-05	4-20-05
Price: T. W.....	12.50c	12.00c	11.50c
Bbls.....	14.00c	13.50c	13.00c

Knoxville, Tenn.

Date.....			4-22-05
Price: T. W.....			11.00c
Bbls.....			14.50c

Lawrenceburg, Tenn.

Date.....		2-17-05	4-25-05
Price: T. W.....		14.00c	13.50c
Bbls.....		16.50c	16.00c

260

Lebanon, Tenn.

Date.....	1-14-05	2-16-05	4-24-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	15.50c	15.00c	14.50c

Lewisburg, Tenn.

Date.....	1-19-05	2-18-05	4-25-05
Price: T. W.....	14.50c	14.00c	13.50c
Bbls.....	16.50c	16.00c	15.50c

Martin, Tenn.

Date.....	1-16-05	2-13-05	4-24-05	11-22-05
Price: T. W.....	13.50c	13.00c	12.50c	13.00c
Bbls.....	15.50c	15.00c	14.50c	15.00c

McKenzie, Tenn.

Date.....	1-19-05	2-18-05	4-25-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	15.50c	15.00c	14.50c

McMinnville, Tenn.

Date.....	1-19-05	2-18-05	4-25-05
Price: T. W.....	15.00c	14.50c	14.00c
Bbls.....	17.00c	16.50c	16.00c

Memphis, Tenn.

Date.....	1-18-05	2-10-05	9-14-05
Price: T. W.....	10.00c	9.50c	9.00c
Bbls.....	13.00c	12.50c	12.50c

Morristown, Tenn.

Date.....	1-16-05	2-17-05	4-22-05
Price: T. W.....	14.00c	13.50c	13.00c
Bbls.....	16.00c	15.50c	15.00c

Murfreesboro, Tenn.

Date.....	1-19-05	2-16-05	4-25-05
Price: T. W.....	13.50c	13.00c	12.50c
Bbls.....	15.50c	15.00c	14.50c

Nashville, Tenn.

Date.....	1-26-05	2-22-05	5-3-05
Price: T. W.	11.50c	11.00c	10.50c
Bbls.	14.50c	14.00c	13.50c

Obion, Tenn.

Date.....	1-18-05	2-6-05	
Price: T. W.	13.50c	13.00c	
Bbls.	15.50c	15.00c	

261

Paris, Tenn.

Date.....	1-16-05	2-13-05	11-22-05
Price: T. W.	13.00c	12.50c	13.00c
Bbls.	15.00c	14.50c	15.00c

Pulaski, Tenn.

Date.....	1-19-05	2-16-05	4-24-05	10-12-05
Price: T. W.	15.00c	14.50c	14.00c	14.00c
Bbls.	17.00c	16.50c	16.00c	16.50c

Ripley, Tenn.

Date.....	1-18-05	2-6-05	
Price: T. W.	13.50c	13.00c	
Bbls.	15.50c	15.00c	

Shelbyville, Tenn.

Date.....	1-19-05	2-16-05	4-25-05
Price: T. W.	14.00c	13.50c	13.00c
Bbls.	15.50c	15.00c	14.50c

So. Pittsburg, Tenn.

Date.....	1-19-05	2-16-05	4-25-05
Price: T. W.	14.50c	14.00c	13.50c
Bbls.	16.50c	16.00c	15.50c

Sparta, Tenn.

Date.....	1-19-05	2-18-05	4-25-05
Price: T. W.			
Bbls.	17.50c	17.00c	16.50c

Springfield, Tenn.

Date.....	2-16-05	4-25-05	
Price: T. W.	12.50c	12.00c	
Bbls.	14.50c	14.00c	

Sweetwater, Tenn.

Date.....	1-19-05	1-31-05	4-22-05
Price: T. W.	14.50c	14.00c	13.50c
Bbls.			

Tracy City, Tenn.

Date.....	1-19-05	2-16-05	4-25-05
Price: T. W.	15.50c	15.00c	14.50c
Bbls.			

Tullahoma, Tenn.

Date.....	1-19-05	2-16-05	4-25-05
Price: T. W.	14.50c	14.00c	13.50c
Bbls.	16.50c	16.00c	15.50c

262

Union City, Tenn.

Date.....	1-16-05	2-13-05	11-22-05
Price: T. W.	13.00c	12.50c	13.00c
Bbls.	15.00c	14.50c	15.00c

Whiteville, Tenn.

Date—(Station not established until August, 1906).

Price: T. W.
Bbls.

Winchester, Tenn.

Date.....	1-19-05	2-18-05	4-25-05
Price: T. W.	14.50c	14.00c	13.50c
Bbls.			

BARREL STATIONS.

Johnsonville, Tenn.

Date.....	1-19-05	2-17-05
Price: Bbls.	15.00c	14.50c

Lexington, Tenn.

Date.....	1-18-05	2-10-05	5-1-05
Price: Bbls.	16.00c	15.50c	15.00c

Mountain City, Tenn.

Date.....	1-20-05	2-18-05	4-22-05
Price: Bbls.	16.00c	15.50c	15.00c

Newport, Tenn.

Date.....	1-16-05	4-22-05
Price: Bbls.	16.50c	16.00c

Rogersville, Tenn.

Date.....	1-16-05	2-18-05	4-22-05
Price: Bbls.	17.00c	16.50c	16.00c

Watertown, Tenn.

Date.....	1-19-05	2-18-05	4-25-05
Price: Bbls.	15.50c	15.00c	14.50c

Cookeville, Tenn.

Date.....	1-20-05	2-17-05	4-25-05
Price: Bbls.	17.00c	16.50c	16.00c

263 MEMORANDUM OF PRICES OF FIREPROOF OIL IN BARRELS AND
FROM TANK WAGON DURING THE YEAR 1906,
AT TENNESSEE STATIONS.

Algood, Tenn.

Date.....	8-18-06	
Price: T. W.		
Bbls.	15.50c	

Athens, Tenn.

Date.....	8-15-06	8-24-06
Price: T. W.	13.00c	12.50c
Bbls.	15.00c	14.50c

Beur Springs, Tenn.

Date.....	8-15-06	
Price: T. W.	12.00c	
Bbls.		

Brownsville, Tenn.

Date.....	8-17-06	
Price: T. W.	12.50c	
Bbls.	15.00c	

Chattanooga, Tenn.

Date.....	6-13-06	6-18-06
Price: T. W.	11.50c	11.00c
Bbls.	14.50c	14.00c

Clarksville, Tenn.

Date.....	6-14-06	8-15-06
Price: T. W.	11.00c	10.50c
Bbls.	13.50c	13.00c

Cleveland, Tenn.

Date.....	6-15-06	
Price: T. W.	12.50c	
Bbls.		

Coal Creek, Tenn.

Date—(No change during 1906). Present prices:		
Price: T. W.	11.00c	
Bbls.	13.50c	

Columbia, Tenn.

Date.....	6-13-06	8-18-06
Price: T. W.	12.00c	11.50c
Bbls.	14.50c	14.00c

264

Covington, Tenn.

Date.....	8-17-06	
Price: T. W.	12.00c	
Bbls.	14.50c	

Danville, Tenn.

Date.....	8-15-06
Price: T. W.	
Bbls.	14.00c

Dayton, Tenn.

Date.....	6-15-06	8-24-06
Price: T. W.		12.50c
(First T. W. price established.)		
Bbls.	15.00c	14.50c

Dickson, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.	12.00c	11.50c
Bbls.	14.00c	13.50c

Dyersburg, Tenn.

Date.....	8-17-06
Price: T. W.	12.00c
Bbls.	14.50c

Erin, Tenn.

Date.....	8-15-06
Price: T. W.	12.00c
Bbls.	

Fayetteville, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.	13.00c	12.50c
Bbls.	15.00c	14.50c

Franklin, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.	11.50c	11.00c
Bbls.	14.00c	13.50c

Gallatin, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.	11.50c	11.00c
Bbls.	14.00c	13.50c

Greeneville, Tenn.

Date.....	6-15-06
Price: T. W.	12.00c
Bbls.	14.50c

265

Harriman, Tenn.

Date.....	6-13-06	8-18-06	9-19-06
Price: T. W.	12.00c	11.50c	11.00c
Bbls.....	14.00c	13.50c	13.00c

Humboldt, Tenn.

Date.....	8-17-06
Price: T. W.	12.50c
Bbls.....	15.00c

Jackson, Tenn.

Date.....	8-17-06
Price: T. W.....	12.50c
Bbls.....	14.50c

Johnson City, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	12.00c	11.50c
Bbls.....	14.00c	13.50c

Jellico, Tenn.

Date.....	6-15-06
Price: T. W.....	11.00c
Bbls.....	12.50c

Knoxville, Tenn.

Date.....	6-13-06	11-3-06
Price: T. W.....	10.50c	10.00c
Bbls.....	14.00c	13.50c

Lawrenceburg, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	13.00c	12.50c
Bbls.....	15.50c	15.00c

Lebanon, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	12.00c	11.50c
Bbls.....	14.00c	13.50c

Lewisburg, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	13.00c	12.50c
Bbls.....	15.00c	14.50c

Martin, Tenn.

Date.....	8-16-06
Price: T. W.....	12.50c
Bbls.....	14.50c

266

McKenzie, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	12.00c	11.50c
Bbls.....	14.00c	13.50c

McMinnville, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	13.50c	13.00c
Bbls.....	10.50c	13.00c

Memphis, Tenn.

Date.....	8-16-06
Price: T. W.....	8.50c
Bbls.....	12.00c

Morristown, Tenn.

Date.....		8-18-06
Price: T. W.....		12.50c
Bbls.....		14.50c

Murfreesboro, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	12.00c	11.50c
Bbls.....	14.00c	13.50c

Nashville, Tenn.

Date.....	6-15-06	8-21-06
Price: T. W.....	10.00c	9.50c
Bbls.....	13.00c	12.50c

Obion, Tenn.

Date.....		8-17-06
Price: T. W.....		12.50c
Bbls.....		14.50c

Paris, Tenn.

Date.....	6-14-06	8-15-06
Price: T. W.....	12.50c	12.00c
Bbls.....	14.50c	14.00c

Pulaski, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	13.50c	13.00c
Bbls.....	16.00c	15.50c

Ripley, Tenn.

Date.....		8-17-06
Price: T. W.....		12.50c
Bbls.....		14.50c

267

Shelbyville, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	12.50c	12.00c
Bbls.....	14.00c	13.50c

So. Pittsburg, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	13.00c	12.50c
Bbls.....	15.00c	14.50c

Sparta, Tenn.

Date.....	8-18-06	8-25-06
Price: T. W.....		14.00c
(First T. W. price.)		
Bbls.....	16.00c	16.00c

Springfield, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	11.50c	11.00c
Bbls.....	13.50c	13.00c

Sweetwater, Tenn.

Date.....	6-15-06	8-24-06
Price: T. W.....	13.00c	12.50c
Bbls.		

Tracy City, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	14.00c	13.50c
Bbls.		

Tullahoma, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	13.00c	12.50c
Bbls.....	15.00c	14.50c

Union City, Tenn.

Date.....		8-15-06
Price: T. W.....		12.50c
Bbls.....		14.50c

Whiteville, Tenn.

Date.....	8-6-06	8-27-06
Price: T. W.....	12.50c	12.00c
Bbls.		

Winchester, Tenn.

Date.....	6-15-06	8-18-06
Price: T. W.....	13.00c	12.50c
Bbls.		

268

BARREL STATIONS.

Johnsonville, Tenn.

Date.....		8-18-06
Price: Bbls.....		14.00c

Lexington, Tenn.

Date—(No change in 1906).	
Price: Bbls.	

Mountain City, Tenn.

Date.....		8-22-06
Price: Bbls.....		14.50c

Newport, Tenn.

Date.....		6-15-06
Price: Bbls.		15.50c

Rogersville, Tenn.

Date.....		6-15-06
Price: Bbls.....		15.50c

Watertown, Tenn.

Date—(No change in 1906).	
Price: Bbls.	

Cookeville, Tenn.

Date.....		8-18-06
Price: Bbls.....		15.50c

MEMORANDUM OF PRICES ON FIREPROOF OIL IN BARRELS AND FROM
TANK WAGON DURING THE YEAR 1907, AT
TENNESSEE STATIONS.

Algood, Tenn.

Date.....	1-21-07	2-27-07
Price: T. W.....	13.50c	13.00c
Bbls.....	15.50c	15.00c

Athens, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 14.50c.

Bear Springs, Tenn.

No change in 1907; present price, T. W. 12.00c.

Brownsville, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 15.00c.

Chattanooga, Tenn.

No change in 1907; present prices, T. W., 11.00c; Bbls., 14.00c.

269

Clarksville, Tenn.

No change in 1907; present prices, T. W., 10.50c; Bbls., 13.00c.

Cleveland, Tenn.

No change in 1907; present price, T. W., 12.50c.

Coal Creek, Tenn.

No change in 1907; present prices, T. W., 11.00c; Bbls., 13.50c.

Columbia, Tenn.

No change in 1907; present prices, T. W., 11.50c; Bbls., 14.00c.

Covington, Tenn.

No change in 1907; present prices, T. W., 12.00c; Bbls., 14.50c.

Danville, Tenn.

No change in 1907; present price, Bbls., 14.00c.

Dayton, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 14.50c.

Dyersburg, Tenn.

No change in 1907; present prices, T. W., 12.00c; Bbls., 14.50c.

Erin, Tenn.

No change in 1907; present price, T. W., 12.00c.

Fayetteville, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 14.50c.

Franklin, Tenn.

No change in 1907; present prices, T. W., 11.00c; Bbls., 13.50c.

Gallatin, Tenn.

No change in 1907; present prices, T. W., 11.00c; Bbls., 13.50c.

Greeneville, Tenn.

No change in 1907; present prices, T. W., 12.00c; Bbls., 14.50c.

Harriman, Tenn.

No change in 1907; present prices, T. W., 11.00c; Bbbs., 13.00c.

Humboldt, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbbs., 15.00c.

Jackson, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbbs., 14.50c.

Johnson City, Tenn.

No change in 1907; present prices, T. W., 11.50c; Bbbs., 13.50c.

Jellico, Tenn.

No change in 1907; present prices, T. W., 11.00c; Bbbs., 12.50c.

Knoxville, Tenn.

No change in 1907; present prices, T. W., 10.00c; Bbbs., 13.50c.

Lawrenceburg, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbbs., 15.00c.

Lebanon, Tenn.

No change in 1907; present prices, T. W., 11.50c; Bbbs., 13.50c.

270

Lewisburg, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbbs., 14.50c.

Martin, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbbs., 14.50c.

McKenzie, Tenn.

Date.....	4-22-07
Price: T. W.....	12.00c
Bbbs.....	14.00c

McMinnville, Tenn.

No change in 1907; present prices, T. W., 13.00c; Bbbs., 15.00c.

Memphis, Tenn.

No change in 1907; present prices, T. W., 8.50c; Bbbs., 12.00c.

Morristown, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbbs., 14.00c.

Murfreesboro, Tenn.

No change in 1907; present prices, T. W., 11.50c; Bbbs., 13.50c.

Nashville, Tenn.

Date.....	1-1-07
Price: T. W.....	9.00c
Bbbs.....	12.00c

Obion, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbbs., 14.50c.

Paris, Tenn.

No change in 1907; present prices, T. W., 12.00c; Bbbs., 14.00c.

Pulaski, Tenn.

No change in 1907; present prices, T. W., 13.00c; Bbbs., 15.50c.

Ripley, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 14.50c.

Shelbyville, Tenn.

No change in 1907; present prices, T. W., 12.00c; Bbls., 13.50c.

So. Pittsburg, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 14.50c.

Sparta, Tenn.

No change in 1907; present prices, T. W., 11.00c; Bbls., 13.00c.

Sweetwater, Tenn.

No change in 1907; present prices, T. W., 12.50c.

Tracy City, Tenn.

No change in 1907; present price, T. W., 13.50c.

Tullahoma, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 14.50c.

Union City, Tenn.

No change in 1907; present prices, T. W., 12.50c; Bbls., 14.50c.

271

Whiteville, Tenn.

No change in 1907; present price, T. W., 12.00c.

Winchester, Tenn.

No change in 1907; present price, T. W., 12.50c.

BARREL STATIONS.

Johnsonville, Tenn.

No change in 1907; present price, Bbls., 14.00c.

Lexington, Tenn.

No change in 1907; present price, Bbls., 15.00c.

Mountain City, Tenn.

Date..... 6-20-07

Price: Bbls..... 14.00c

Newport, Tenn.

No change in 1907; present price, Bbls., 15.50c.

Rogersville, Tenn.

No change in 1907; present price, Bbls., 15.50c.

Watertown, Tenn.

No change in 1907; present price, Bbls., 14.50c.

Cookeville, Tenn.

Discontinued June 27, 1907.

Stipulation. Filed July 5, 1907. J. D. G. Morton, C. & M.

(Trans., Vol. 2, p. 141.)

In the Chancery Court of Sumner County, Tennessee.

Rule No. 237.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY OF KENTUCKY.

Stipulation.

In this cause, to avoid expense, it is stipulated and agreed, as follows:

1. That on the 17th day of May, 1904, the Grand Jury of the State of Tennessee, empaneled at the May term, 1904, of the Circuit Court of Sumner County, Tennessee, returned into open court four indictments against the Standard Oil Company, O'Donnell Rutherford and C. E. Holt as defendants. These indictments were all in the same form, except that where the name of S. W. Love appears in the indictment hereinafter set out, the name of J. E. Cron appears in the second, the name of W. H. Lane appears in the third, and the name of L. C. Hunter & Co. appears in the fourth.

2. The indictment in the case first mentioned, that is, in the "Love case," is as follows:

STATE OF TENNESSEE, *Sumner County*:

Circuit Court, May Term, 1904.

The grand jurors for the State of Tennessee, elected, empaneled, sworn and charged to inquire for the body of the County of Sumner, present that the Standard Oil Company, a corporation manufacturing, refining and dealing in oil, chartered under the laws of the State of _____, said State to the grand jurors unknown, and doing business in the State of Tennessee, C. E. Holt and O'Donnell Rutherford, agents of the Standard Oil Company, heretofore, to wit: On the 12th day of October, 1903, in the State and county aforesaid, unlawfully, knowingly, feloniously, wickedly and maliciously conspired together, contracted and agreed with one S. W. Love for the purpose and with a view of lessening and destroying full and free competition in the sale of a certain article of sale, imported into said State, to wit: coal oil, to the evil example to all others in like cases offending, contrary to the statute in such cases made and provided, and against the peace and dignity of the State.

R. L. Peck, Attorney-General, and the grand jurors aforesaid, upon their oaths, aforesaid, further present that the said Standard Oil Company, C. E. Holt and O'Donnell Rutherford, agents of the said Standard Oil Company, on the day and year aforesaid, and in the State and county aforesaid, knowingly, wickedly and maliciously, with a view to lessen and destroy full and free competition in the

sale of a certain article of sale, imported into the State, to wit, coal oil, did unlawfully and knowingly contract and agree with one S. W. Love countermanding an order of ten (10) barrels of coal oil theretofore given the Evansville Oil Company, for which the said Love was to pay — cents per gallon, to give him, the said S. W. Love, one hundred (100) gallons of coal oil free; and the said Love, accepting said proposition, the said Holt, agent as aforesaid, knowingly carrying out said stipulation and order, made in furtherance of said conspiracy, wrote a telegram addressed to the said Evansville Oil Company, of Evansville, Indiana, countermanding the said order of ten (10) barrels of oil, which he, the said Love, at the request of the said Holt, agent as aforesaid, signed, and which the said Holt, agent as aforesaid, sent to the said Evansville Oil Company, he, the said Holt, agent as aforesaid, paid for said telegraph message; and the said C. E. Holt, agent as aforesaid, representing, stipulating, contracting and agreeing for the Standard Oil Company, as aforesaid, and the said O'Donnell Rutherford, agent as aforesaid, knowingly carrying out said stipulation and order made in said furtherance of said conspiracy by the said Standard Oil Company, delivered said one hundred (100) gallons of coal oil to the said S. W. Love, thereby lessening competition in said article of sale, as aforesaid, and so the grand jurors aforesaid, upon their oath aforesaid, present and say that the Standard Oil Company, C. E. Holt and O'Donnell Rutherford, agents of the Standard Oil Company, by the means aforesaid, in manner and form aforesaid, unlawfully, knowingly, feloniously, willfully, wickedly and maliciously conspired, controlled, stipulated and agreed with the said S. W. Love for the purpose and with a view of lessening and destroying full and free competition in the sale of a certain article of sale, imported into the State, to wit, coal oil, to the evil example of all others in like cases offending, contrary to the statute and against the peace and dignity of the State.

R. L. PECK,

Attorney-General.

Endorsed.

STATE OF TENNESSEE

VERSUS

STANDARD OIL COMPANY ET AL.

Violating Anti-Trust Law.

R. L. Peck, Attorney-General, *ex-Officio* Prosecutor.

Summon for the State:

Claude Roseman, S. W. Love, Guy Fitzgerald, Walter Douglas,

A. C. Dobbins, Harris Brown, and T. M. Honeywell.

Witnesses sworn by me at —, upon this indictment at May Term, 1904.

W. H. DUNN,

Foreman Grand Jury.

R. L. PECK,

Attorney-General.

W. H. DUNN,

Foreman of Grand Jury.

Capias.

Issued May 19, 1904.

R. W. CALDWELL, *Clerk.*

274 3. Process issued on these indictments, and the said three defendants were apprehended and brought before said Court for trial thereunder.

4. On May 24, 1904, the defendants entered motions in all four of the cases to quash the indictments, but said motions were all overruled. The grounds of the motion were the same in all of the cases, but it was not assigned as a ground for said motion in any of them, that the defendant, the Standard Oil Company, could not be indicted under the act, which is Chapter 140 of the Acts of the State of Tennessee for the year 1903, or that it could not be indicted under any of the laws of Tennessee.

5. The defendants were arraigned under said indictment in the case known as the "Love case," above set out, and on the 20th day of September, 1904, formally pleaded not guilty, and for trial, put themselves on the country, as did the Attorney-General.

6. The defendants were put upon trial upon said "Love indictment," and on the 22d day of September, 1904, a verdict was rendered by the jury in said Court in said case, that said O'Donnell Rutherford was "not guilty," and that the Standard Oil Company was "guilty," and should pay a fine of \$5,000 and that the defendant, Holt, was "guilty," and should pay a fine of \$3,000, and judgment was then rendered by said Court upon said verdict accordingly.

In the argument to the jury the District Attorney-General said, in substance, that he regarded O'Donnell Rutherford as the tool of the other defendants, and that the jury had his consent and request to return a verdict of not guilty as to the Sumner County boy, O'Donnell Rutherford.

In the Court below, among other grounds in arrest of judgment, the defendants interposed the following: "Because the indictment in the case, and the matters therein contained are not sufficient in law to *maintain* this action."

7. Said case was appealed by the defendants, the Standard Oil Company and said Holt, to the Supreme Court of Tennessee, sitting at Nashville, and errors assigned against the judgment appealed from, according to the practice of said Court. The only errors assigned in the case in said Court, which the State of Tennessee claimed related to the procedure against the punishment of foreign corporations for violating said Chapter 140 of the Acts of 1903, or any other law of Tennessee, were in the following words, namely:

"No. 30. The Act of 1903 does not authorize or permit a fine to be imposed upon an offending corporation, and therefore the Court had no power to fine the defendant company in this case."

"No. 32. The Court erred in charging that the defendant, Stand-

ard Oil Company, could be indicted, convicted and fined by
275 a verdict of a jury, and in pronouncing a judgment accord-
ing to such fine, and for a violation of the Anti-Trust Act
of Tennessee, passed in 1903."

Said assigned error No. 32 was directed at that part of the trial judge's charge, as follows:

"The indictment in this case is based upon Chapter 140, House Bill No. 65, of the Acts of the Legislature of Tennessee, of 1903, and upon sections 1 and 3 of each act."

"Section 1 is as follows:

"That from and after the passage of this act, all arrangements, contracts, agreements, trusts, or combinations, between persons or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth, or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations, between persons or corporations, designed, or which tend to advance, reduce, or control the price or the cost to the producer or consumer of any such articles, or products, are hereby declared to be against public policy, and unlawful and void."

"Section 3 of the same act is as follows:

"That any violation of the provisions of this act shall be deemed, and is hereby declared to be destructive of full and free competition, and a conspiracy against trade, and any person, or persons, who may engage in any such conspiracy, or shall, as principal, manager, director or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders made in furtherance of such conspiracy, shall, upon conviction, by fine of not less than one hundred dollars, nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one year, nor more than ten years, or in the judgment of the Court, by either such fine or imprisonment."

"This law embraces these two sections, has been before the Supreme Court of our State twice, and whether a good law or a bad law, has been pronounced by the said Court to be the law of the land, and if the proof in this case shows beyond a reasonable doubt that this law has been violated by either one or all of the defendants, as charged in the indictment, then it would be the duty of the jury to return a verdict of guilty against such of the defendants as the proof shows to be guilty."

A supplemental brief filed in support of errors Nos. 30
276 and 32 assigned on page 47 of the original brief, stated the following proposition:

"No fine can be imposed on a corporation for a violation of this act. Persons may be fined, but corporations cannot. They must be proceeded against by the Attorney-General of the State by *quo warranto* proceedings to forfeit franchises, and to oust from the State."

"The word 'person' in a statute may, and oftentimes does, include corporations. It is so used in section 62 of the Code of Ten-

nessee, which was adopted in 1858. But section 62 is, of course, limited to that code. Even as there used, it does not include public corporations."

"In *State vs. Ohio, etc., R. R. Co.*, 23 Ind., 362, it was held that the provisions of the Indiana Code that the word 'person' as used therein, should extend to bodies politic and corporate, did not apply to the *criminal Code of the State*."

"Penal statutes, particularly when they are severe, are strictly construed.

"Whether the word 'person' in a statute shall be construed to include 'corporations,' is always a question of legislative intent, to be sought for and determined, in the particular case, by the aid of the context, the general scope and purpose of the act, and other pertinent considerations.

"Black on Interpretation of Laws, 138.

"Endlich on Int. of Statutes, secs. 88, 89."

"Tried by this rule, it is clear that no offending corporation can be fined under the act now under consideration."

"Section 1 defines the offense: It provided that all persons *and* corporations entering into combinations for the purpose forbidden by the act, shall be guilty of a conspiracy against trade."

"Section four permits persons *and* corporations to sue for and recover the price paid for goods sold to them by the conspirators."

"Section two provided that any offending *corporation* shall forfeit its charter if it be a Tennessee corporation, or be ousted from the State if it be a foreign one; and that the Attorney-General of the State shall institute all necessary proceedings."

"Section three provided that any *person* offending, shall be punished by fine and imprisonment."

"The context shows that the Legislature had the distinction between persons and corporations sharply in mind, and legislated accordingly. The offense can be committed by either, and therefore, both are forbidden to enter into any such combination."

"Both persons and corporations may buy goods from dealers in a combination, and therefore such purchasers, whether they be
277 persons or corporations, are allowed to sue for and to recover back the price paid.

"But, when it comes to the question of punishment, both are not dealt with alike, and they are no longer mentioned in conjunction. Section 2 prescribes the punishment for 'corporations' alone, and section 3 for 'persons' alone. The Attorney-General of the State is required to institute the necessary (*quo warranto*) proceedings to forfeit the charter, or to oust the company, accordingly as it is a foreign or domestic corporation. But 'persons' (under section 3) are to be fined or imprisoned. It follows that the indictment of this company is unauthorized, and all the proceedings in the case absolutely void.

"No District Attorney-General can proceed by indictment against a corporation, under this act. The Attorney-General of the State, if the case be one calling, in his judgment, for proceedings, may bring a bill in equity in the nature of a *quo warranto* proceeding,

to oust the foreign corporation from doing business in Tennessee. That is what is to be done, and it is all that can be done. And, as already shown, even that cannot be done, if the corporation is engaged in interstate commerce business. That is to say, speaking precisely, the Standard Oil Company might be ousted from maintaining stations in Tennessee, and selling oil therefrom, as it does now, but it could not be ousted from selling oil in original packages here, even by proceedings inaugurated by the Attorney-General of the State. But whatever he may be able to do under this act, certain it is that no District Attorney-General can indict the company, and no Court can fine it, as the Court in this case assumed to do."

"The defendant, Holt, being a person, could be indicted and fined, if guilty of a violation of the act. He was convicted and fined, but the conviction must be set aside, and the judgment reversed, for the reasons stated in the original brief."

"The theory of the charge is that a *corporation* can be indicted and fined under this act. Our contention is that it can not."

8. On the 16th day of March, 1907, the said judgment of the Circuit Court of Sumner County, Tennessee, was reversed by the judgment of the Supreme Court of Tennessee, on the hearing of said appeal, as to the defendant, the Standard Oil Company, and by the said judgment the said indictment was quashed and the case dismissed as to the defendant company; but said judgment of the Circuit Court was affirmed by the Supreme Court as to said Holt. The judgment against the Standard Oil Company was reversed and the indictment quashed for the reasons set forth in the judgment and the opinion of the Court; a certified copy of the judgment of the Supreme Court was exhibited herewith as exhibit No. 1.

9. On the 28th day of May, 1907, the said other three indictments, still pending in the Circuit Court of Sumner County, Tennessee, were disposed of and finally determined by the said Court, as shown by the certified copy of the minutes thereof, hereto attached, marked Exhibit No. 2 as a part hereof.

10. The Standard Oil Company, defendant in and to said four indictments, is the same Standard Oil Company that is the defendant in this case, and the said J. E. Cron, W. H. Lane, L. C. Hunter & Co., and S. W. Love, in said indictments mentioned, are the same persons mentioned and named in the bill in this case; and the alleged agreement, or combination and conspiracy and gift of oil in said indictments mentioned, are the same agreements, combinations, conspiracies and gifts of oil mentioned in a bill in this cause; and the said C. E. Holt and O'Donnell Rutherford, mentioned in the said indictments, are the same persons of that name mentioned in the bill in this cause.

11. J. E. Comer was the Special Agent of the Standard Oil Company at Nashville, Tennessee, from the year 1901 until his death. He died on the 14th day of October, 1906, at Nashville, Tennessee. He testified on the said trial of the said "Love case" on the 22d day of September, 1904, as a witness for the defendants. His evidence, then given on said trial, was, and is, set forth and shown by the certified copy thereof, which is hereto attached, marked Exhibit No. 3 as a part hereof.

12. This stipulation, and any part thereof, may be read as evidence on the trial of this cause, by either party, subject to the right of exception only for incompetency of the particular matter of fact which may be excepted to as evidence at the hearing, and to the right of the State to except to the evidence of said Comer, Exhibit No. 3 thereto, upon the ground that the said evidence given by him in that case, on that trial, is not admissible as evidence in the present cause, even though the witness has died since the same was given.

This stipulation shall be filed as a part of the record in this cause.

13. Whatever oil the defendant company may have had at Gallatin, Tennessee, at the time of the matters complained of in the bill, had been imported by it from other States, and was there held by it for sale generally.

Agreed to and signed by counsel on this the 2d day of July, A. D. 1907.

CHARLES T. CATES, Jr.,
Attorney-General for the State.
 VERTREES & VERTREES,
 JAS. W. BLACKMORE,
Solicitors for Defendant.

279 EXHIBIT No 1. Filed July 5, 1907. J. D. G. Morton,
 C. & M. (Vol. 2, p. 162.)

STATE OF TENNESSEE:

Be it remembered, that at a Supreme Court of Errors and Appeals, begun and held at the Capitol, in the City of Nashville, on the first Monday in December, 1906, it being the third day of December, 1906, neither Judge attending, I adjourned Court until tomorrow morning at 9 o'clock.

JOE J. ROACH, *Clerk.*

The Clerk adjourned Court from day to day until Monday, December 10, 1906.

MONDAY, December 10, 1906.

Court met pursuant to adjournment—present Honorable Associate Justices Jno. S. Wilkes, W. K. McAlister, M. M. Neil, and Jno. K. Shields—when the following proceedings were had, to wit:

March 16, 1907.

STANDARD OIL COMPANY and C. E. HOLT
versus
 THE STATE.

No. 1 Sumner Criminal.

This day came the plaintiffs in error by their attorneys, and the State, by her Attorney-General, and this cause was heard upon the transcript of the record from the Circuit Court of Sumner County,

and argument of counsel having been heard, and it appearing to the Court that there is error in the judgment of the court below against plaintiff in error, Standard Oil Company, for the reasons set out in the opinion of the Court, the judgment of the Court against said Standard Company is reversed, the indictment quashed, and the case as to it is dismissed without prejudice to such other proceedings as may be instituted against said Standard Oil Company to enforce the provisions of Chapter 140 of the Acts of 1903, and particularly the provisions of section 2 of said act.

And it further appearing that there is no error in the judgment of the Court below against plaintiff in error, C. E. Holt, said judgment is in all things affirmed.

Therefore, it is further ordered and adjudged that the State of Tennessee have and recover of said C. E. Holt the amount of the fine imposed upon him in the Court below, that is, the sum of three thousand dollars, and all the costs of this cause, for which execution may issue.

280 Whereupon said Holt appeared in open Court, and through his attorney, John J. Vertrees, paid to the Clerk thereof the amount of said fine and all costs, and was thereupon discharged and allowed to depart without day.

Office of Clerk of the Supreme Court for the Middle Division of
Tennessee.

I, Joe J. Roach, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the judgment of said Court, pronounced at its December term, 1903, in case of Standard Oil Company and C. E. Holt against the State, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at office, in the Capitol of Nashville, on this the 26th day of June, 1907.

[SEAL.]

JOE J. ROACH, *Clerk.*

Exhibit No. 1. Filed July 5, 1907. J. D. G. Morton, C. & M.

STATE OF TENNESSEE, *Sumner County:*

Be it remembered that at a Circuit Court begun and held at the Courthouse in Gallatin, for the State and County aforesaid, on the third Monday in May, A. D. 1907, the same being the day fixed by act of the General Assembly of the State for the holding of said Court, and the 20th day of the month; Court met according to law, present and presiding the Honorable B. D. Bell, Judge, etc., when the following proceedings were had and entered of record, to wit:

May Term, 1907, First Day of June, 1907.

THE STATE OF TENNESSEE
versus
STANDARD OIL COMPANY ET AL.

Came the Attorney-General, who prosecuted in behalf of the State, and the defendants, by their attorneys, when on motion of the Attorney-General, by consent of the Court, the indictment is dismissed in this case, as to the defendant, the Standard Oil Company. Thereupon came a jury of good and lawful men of Sumner County, to wit: S. P. Jameson, C. J. Shaub, Virgil Riggsbee, Jno. Ellis, W. R. Fisher, C. B. Robertson, W. T. Bratton, F. J. Hutcheson, Z. T. Key, G. W. Chipman, W. B. Frazier and J. J. Chambers, who being elected, empanelled and sworn, to try the issues joined between the State of Tennessee and the defendant, C. E. Holt, and a true verdict rendered according to the law and the evidence, upon their oaths, do say they find the defendant guilty as charged in the indictment. It is, therefore, considered by the Court that the defendant, C. E. Holt, pay a fine of one hundred dollars and the costs of this cause. Said fine and costs having been paid into Court, no *fi. fa.* will issue. Said fine will be held by the Clerk of the Court until further orders from the Court. This judgment is entered now for May 27, 1907, and the judgment entered on that day in this cause is vacated and annulled.

I, R. W. Caldwell, Clerk of the Circuit Court of Sumner County, Tennessee, at Gallatin, do certify that the foregoing is a true and perfect transcript of the judgment entered in the case of the State of Tennessee *vs.* the Standard Oil Company, as appears of record now on file in my office.

Witness my hand and the seal of the Court this June 24th, 1907.
[SEAL.] R. W. CALDWELL, Clerk.

May Term, 1907, 1st Day of June, 1907.

THE STATE OF TENNESSEE
versus
STANDARD OIL COMPANY ET AL.

Came the Attorney-General, who prosecuted in behalf of the State, and the defendants, by their attorneys, when, on motion of the Attorney-General, by consent of the Court, the indictment is dismissed in this case, as to the defendant, the Standard Oil Company. Thereupon came a jury of good and lawful men of Sumner County, to wit: S. P. Jameson, C. J. Shaub, Virgil Riggsbee, Jno. Ellis, W. R. Fisher, C. B. Robertson, W. T. Bratton, F. J. Hutcheson, Z. T. Key, G. W. Chipman, W. B. Frazier, and J. J. Chambers, who, being elected, empanelled and sworn, to try the issues joined between the State of Tennessee and the defendant, C. E. Holt, and a true

verdict render, according to the law and the evidence, upon their oaths do say they find the defendant guilty as charged in the indictment. It is therefore considered by the Court, that the defendant, C. E. Holt, pay a fine of one hundred dollars and the costs of this cause.

Said fine and costs having been paid into Court, no *fi. fa.* will issue.

Said fine will be held by the Clerk of the Court till further orders from the Court.

This judgment is entered now for May 27, 1907, and the judgment entered on that day in this case is vacated and annulled.

282 I. R. W. Caldwell, Clerk of the Circuit Court of Sumner County, Tennessee, at Gallatin, do certify that the foregoing is a true and perfect transcript of the judgment entered in the cases of the State of Tennessee *vs.* the Standard Oil Company, as appears of record now on file in my office.

Witness my hand and the seal of the Court this June 24th, 1907.
[SEAL.] R. W. CALDWELL, Clerk.

May Term, 1907, 1st Day of June, 1907.

THE STATE OF TENNESSEE
versus
STANDARD OIL COMPANY ET AL.

Came the Attorney-General who prosecutes in behalf of the State, and the defendants, by their attorneys, when, on motion of the Attorney-General, by consent of the Court, the indictment is dismissed in this case as to the defendant, the Standard Oil Company. Thereupon came a jury of good and lawful men of Sumner County, to wit: S. P. Jameson, C. J. Shaub, Virgil Riggsbee, Jno. Ellis, W. R. Fisher, C. B. Robertson, W. T. Bratton, F. J. Hutcheson, Z. T. Key, G. W. Chipman, W. B. Frazier, and J. J. Chambers, who, being elected, empanelled and sworn, to try the issues joined between the State of Tennessee and the defendant, C. E. Holt, and a true verdict render, according to the law and the evidence, upon their oaths do say they find the defendant guilty as charged in the indictment. It is therefore considered by the Court that the defendant, C. E. Holt, pay a fine of one hundred dollars, and the costs of this cause. Said fine and costs having been paid into Court, no *fi. fa.* will issue. Said fine will be held by the Clerk of the Court till further orders from the Court. This judgment is entered now for May 27, 1907, and the judgment entered on that day in this cause is vacated and annulled.

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Witness my hand and the seal of this Court, this June 24th, 1907.
[SEAL.] R. W. CALDWELL, Clerk.

283 *Deposition of J. E. Comer. Exhibit No. 3 to Stipulation.
Filed June 12, 1907. J. D. G. Morton, C. & M.*

In the Circuit Court of Summer County.

STATE OF TENNESSEE

versus

STANDARD OIL COMPANY, C. E. HOLT and O'DONNELL RUTHERFORD.

The evidence of J. R. Comer, called and sworn on behalf of the defendants on the trial of the above case in the circuit court of Summer County, Tennessee, at the September term, 1904.

J. E. COMER, called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. VERTREES, for Defendant:-

Q. Where do you live?

A. Nashville.

Q. What is your business?

A. I am special agent of the Standard Oil Company.

Q. At Nashville?

A. Yes, sir.

Q. How long have you been such agent there?

A. For a little less than three years at Nashville.

Q. What are your duties, or the duties of a special agent of the company?

A. The general superintendency of the marketing of their products.

Q. And the local agents and salesmen?

A. Yes, sir.

Q. He is the general manager for that territory?

A. Yes, sir.

Q. What is your territory?

A. We have East Tennessee up to Bristol, Middle Tennessee, a small portion of Kentucky, North Alabama, and just a little of North Georgia.

Q. That is your territory; that is, under your control?

A. Yes, sir.

Q. Where are the headquarters of the company?

A. For this agency, Cincinnati, Ohio.

284 Q. Now, so far as local agents are concerned, such as Mr. Rutherford, what are his duties and powers?

A. Mr. Rutherford's duties are to deliver the oil to the merchants in town, and in what we call the circuit points, sell the oil and collect for it, turn the money in and account for the amount of stock of oil on hand.

Q. He keeps a stock of oil on hand in station tanks?

A. Yes, sir; and also barreled oil, which he barrels from the tanks.

Q. That is to deliver to such as want barrels of oil?

A. Yes, sir.

Q. Explain what the tank wagon means?

A. That is used to deliver oil to the merchants, have a circuit in which to deliver it, and the merchants have storage in which to put the oil, those who are accessible. There are merchants who live out too far to be reached by the tank wagon, that buy in barrels.

Q. What are the advantageous features of the tank wagon?

A. The best feature is full measure, and another is the merchant does not have to buy a whole barrel; we deliver from twenty gallons up, delivering to the merchant, and he buys the small quantity at the same prices as does the merchant who buys large quantities; and then the barrel is usually recognized as the middle man's profit in the oil business. It comes direct from the refinery to the storage tank, and then from there to the merchants, without any cost for barreling or anything, and so makes the oil cheaper.

Q. Are you acquainted with Mr. C. E. Holt?

A. Yes, sir.

Q. What is his connection with the company?

A. Refined oil salesman.

Q. In your territory?

A. Yes, sir.

Q. Under you?

A. Yes, sir.

Q. How long has he been a salesman?

A. A little over two years.

Q. What are his duties and powers, and what were they in 1903?

A. Mr. Holt's duties are to sell refined oil, gasoline, and naptha, visit the tank wagon stations, call on the merchants who buy from tank wagons, sell them additional storage, and arrange the route so as to make it convenient for the agent to dispose of each tank wagon load of oil on each trip when he goes to the country, and he also takes an inventory when he goes to the station.

Q. An inventory of what they have?

A. Yes, sir.

Q. Under whose orders is he?

A. Under my orders.

285 Q. Has he any control or power over the management of the affairs?

A. No, sir.

Q. Has the local agent any?

A. No, sir.

Q. From whom does he get his orders?

A. From my office.

Q. And you had charge at Nashville of this territory during the year 1903, as I understand you?

A. Yes, sir.

Q. Mr. Rutherford and Mr. Holt, were they in the service of your company, under you, at that time?

A. Yes, sir.

Q. In what capacities?

A. Mr. Holt as salesman and Mr. Rutherford as agent at Gallatin.

Q. You have been present during this trial, and heard the statements of witnesses as to certain transactions with S. W. Love, the giving away of some oil to Mr. Love, have you not?

A. Yes, sir.

Q. State what knowledge you, or any officer of the company, so far as you know, any managing officer, had of that?

A. The first knowledge I had of any oil being given away was on the 23d of December, and was received from Mr. O'Donnell Rutherford. We had some correspondence with Mr. Rutherford, from the Nashville office, about a shortage in his stock at Gallatin. Our letters not being replied to promptly, Mr. Wilson, who attends to that feature of the business, called up Mr. Rutherford over long distance 'phone, to ask why his letters were not answered. It is not customary to charge the shortage until it is fully developed that it is correct, and has, in fact, occurred.

By Mr. PECK, for the State:

Q. Did you hear the conversation and know he was talking to Mr. Rutherford?

A. I cannot say that I heard the conversation, but he called him up at my direction.

By Mr. VETREES, for Defendant:

Q. And in the office where you stay and are present?

A. Yes, sir; I could not repeat the conversation word for word, though.

Q. Could you hear the Nashville end of it?

A. No, sir.

Q. If I understand you, you directed Mr. Wilson to call up Mr. Rutherford?

A. Yes, sir.

286 Q. You say he reported that there was a conversation?

A. Yes, sir; and Mr. Rutherford stated that he would come down that afternoon and explain the matter, which he did.

Q. Did he come to see you?

A. Yes, sir; he came to see me. He brought along with him one of the Gallatin papers, and the first thing he told me was that, in order to countermand those orders, he had been directed by Mr. Holt to give away, all together, three hundred gallons of oil, and that had caused the shortage to be shown in his stock. I told him that I could not countenance a transaction of that kind, and asked why he didn't call me up or write me before the oil was given away, as he knew we had him under bond to account for the stock, and only held him responsible for the stock in his charge. At the same time I told him we would have to charge him with the full amount of the oil, which we did.

Q. Was that or not the first knowledge you had of the transaction?

A. That was my first knowledge of the transaction of giving the oil away.

Q. State whether or not Mr. Rutherford was charged with that oil by the company?

A. He was charged with it.

Q. That is, he paid for it?

A. Yes, sir.

Q. It was retained out of money due him?

A. Yes, sir.

Q. Now, a copy of a letter has been introduced in evidence that purports to be from you to Mr. Holt. What do you know about that letter?

A. I wrote Mr. Holt as soon as I received the information. I wrote him a letter and asked him to explain if he did it, and why he did it. I also told him I disapproved of the transaction as foreign to anything that had been done in the past, and to our general policy.

Q. And, in point of fact, was it foreign to your policy, or had anything of the kind been done in the past?

A. No, sir.

Q. Or at any time?

A. No, sir.

Q. When did you see Mr. Holt first after you got this information?

A. You mean after the giving away of the oil?

Q. Yes, after you got information of that?

A. I cannot say just what day it was I saw him, but it was only a few days afterwards.

287 Q. I wish to ask you whether or not, when you did see him, whether you approved or condemned the transaction?

A. I condemned it; I told him particularly then what I had stated in my letter.

Q. You have stated, Mr. Rutherford brought down a copy of the Gallatin paper containing a statement of it?

A. Yes, sir.

Q. Was that your first knowledge of the paper?

A. Yes, sir.

Q. Had there been any publication at that time in any of the Nashville papers, at that time?

A. If there had at that time I had not seen or heard of it.

Q. Now, I will ask you about the custom and usage among merchants to countermand orders, which are given by merchants; do you know about that?

A. Well, it is customary.

Objected to by the State unless confined to the oil business.

A. I only speak for the oil business; it is customary to produce all the talking points we have in our favor.

Q. I am not on that point; what I am asking is on the question of dealers and men sending in an order and subsequently counter-

manding it, whether there is any use or custom of the trade that permits merchants to do that?

A. In our business we frequently get countermands of orders. It is always customary to accept countermands if it arrives at our house before the goods are shipped; it is also customary, if the goods have even been placed in the depot, to take them from the depot if they have not left town; that is done without even writing to know why the countermand is ordered; then I send usually with the letter to the salesman the letter countermanding it, so the salesman can call on the merchant the next trip and sell him again.

Thereupon adjournment was taken until this afternoon at 1:30.

Afternoon Session.

J. E. COMER resumed.

Cross-examination.

By Mr. PECK, Attorney-General:

Q. How long have you been working for the Standard Oil Company?

A. About eleven years.

Q. How long have you been at Nashville?

A. A little less than three years.

288 Q. Where were you before you came to Nashville?

A. I was at Chattanooga, Tennessee.

Q. How long were you with them at Chattanooga?

A. I was at Chattanooga a little more than three years.

Q. Where were you before you were at Chattanooga?

A. I traveled through three or four Southern States.

Q. Traveled for the Standard Oil Company?

A. Yes, sir.

Q. You are now superintendent of the office at Nashville?

A. The title is special agent, but the duties are practically the same.

Q. And you have under your control East and Middle Tennessee and Alabama?

A. Only a small portion of Northern Alabama.

Q. And a portion of Georgia?

A. I little portion of Georgia.

Q. Kentucky?

A. Small portion of Kentucky.

Q. Mr. Holt is one of your traveling salesmen?

A. Yes, sir.

Q. And Mr. Holt has been with you about two years or more?

A. In the capacity of salesman; yes, sir.

Q. And before that he was local agent at Lebanon, Tennessee?

A. Yes, sir.

Q. What is Mr. Holt's territory?

A. Well, his territory is Middle Tennessee and a small portion of Kentucky and Northern Alabama.

Q. He travels over that territory about how often, what is the interval between his trips, between one point and the same point again?

A. In some instances thirty days, and some sixty days; there is no regular interval.

Q. Gallatin and Sumner County was in his territory?

A. Yes, sir.

Q. Last October, October, 1903, you learned, I believe, Mr. Comer, that a representative of the Evansville Oil Company had been in Gallatin, in Sumner County, and sold some oil?

A. Yes, sir.

Q. Where was Mr. Holt at the time you learned that?

A. I cannot recall just now where he was.

Q. On the road somewhere?

A. Yes, sir.

Q. You sent for Mr. Holt to come in?

A. No, I think I wrote him to go to Gallatin.

Q. What did you want him to come to Gallatin for?

A. I wanted him to hold the trade if he could.

289 Q. You gave him a *carte blanche* as to the methods he should employ to hold this trade, did you not?

A. No, he had been instructed; he understood his duties as salesman.

Q. You sent him up here, did you not, for the purpose of getting those parties to cancel their orders that they had given this Evansville oil company?

A. If they chose to do so; yes, sir.

Q. Were not one of those your instructions you gave him, and didn't you hear Mr. Holt make that statement?

A. I don't think I gave him any particular instructions for this trip, for this particular case.

Q. You did not send him here for the purpose of getting these men to countermand these orders?

A. I was not aware that any sales had been made just at that time.

Q. Didn't you say a moment ago that you did have information?

A. I knew the salesman had been here, but didn't know that he had made any sales.

Q. Is that a practice of yours, whenever you hear of a representative of any other oil company touching your territory, regardless of whether he makes sales or not, or whether you know it, that you immediately call one of your men to go and see about it?

A. No, it is not a practice; cannot say that it is a practice.

Q. This is the only time you ever did it?

A. No, sir.

Q. Whatever time and place did you do such where you did not know the sales had been made?

A. I don't recall any particular place or occasion, but it had been done before.

Q. It had been done before?

A. Yes, sir.

Q. You said a moment ago that you sent him here to hold his trade; what do you mean by that?

A. I mean this: in making sales, the Evansville Oil Company and other competitors might obtain orders without bringing out the unfavorable side to the merchant, and it is the duty of our salesman, as we consider it, to bring out his side, to explain his side; that is the object of sending the salesman out.

Q. And this is all you meant when you said you sent him here to hold his trade?

A. Yes, sir.

Q. And Mr. Holt is mistaken when he says you sent him here to get those orders countermanded?

A. Well, I don't say that; if by explaining to the merchant the facilities of our delivery, the quality of our oil, and the prices and way of handling it, if the merchant wants to countermand, we authorize to countermand.

Q. And, if necessary, you give a little free oil?

A. We have never authorized it at all.

Q. Your authorized agent did not do this?

A. I understood Mr. Holt gave away some oil.

Q. The man you sent up here to hold his trade, your authorized agent, is the man who gave away this oil, Mr. Holt?

A. Our salesman, Mr. Holt.

Q. What is the special advantage, Mr. Comer, that the Standard Oil Company has over everybody else, the inducements you hold out?

A. You mean in order to hold our trade?

Q. Yes.

A. We claim that our method of delivery is superior to any other; the merchant gets better measure by that method than he does in barrels; he suffers no loss from leakage, which is generally the case in buying in barrels.

Q. Don't your company, when they ship oil in barrels, guarantee against any loss for leakage?

A. We do not. When we ship a barrel of oil, we take a receipt from the railroad company showing it to be in good condition; if the barrel is received in bad condition, we ask the railroad company to make it good.

Q. Then, if any other corporation, competitor of yours, shipping in barrels, were to guarantee against loss from leakage, you would then be placed upon an equality with it, wouldn't you, so far as that feature is concerned?

A. If they carried out their guarantees, perhaps they would in that respect.

Q. Mr. Holt is traveling salesman for your company, selling refined oil?

A. Yes, sir.

Q. Well, it is called coal oil, is it not, Mr. Comer?

A. That is the term commonly used.

Q. It is known with the layman and average citizen as coal oil?

A. Yes, sir.

Q. Mr. Holt gets his orders from you, you stated to Mr. Ver-trees before known?

A. Yes, sir.

Q. And Mr. Rutherford gets his orders from you?

A. Yes, sir.

Q. How did you first learn that this Evansville man had been here, Mr. Comer?

291 A. We had a salesman in town that day; I think I received a letter from Mr. Rutherford, and this salesman, in the same mail, advising me of the presence of the Evansville man.

Q. See if you can think exactly where Mr. Holt was at the time you communicated with him?

A. When I first communicated with him, I cannot recall, because I don't know where I addressed the letter.

Q. Did you locate him or find him at any particular point?

A. Yes, sir.

Q. And instructed him to proceed to Gallatin?

A. Yes, sir.

Q. Where was he when you got in communication with him?

A. I think he was about Monterey, Tennessee, or somewhere up the Tennessee Central.

Q. Up in Putnam County?

A. I believe it is.

Q. When he came here he saw these people and made a report to you of his trip, did he not?

A. Yes, sir.

Q. Is it not a fact, Mr. Comer, that you require your traveling salesman to make daily reports to you?

A. Yes, sir.

Q. Did he, on that day, after his trip to Gallatin, make you a report of his day's proceedings?

A. He most likely did.

Q. What was that report?

A. I cannot give you the contents of it now.

Q. Have you no recollection of what it was?

A. No, sir; not particularly that report.

Q. You had sent him here especially to attend to that business?

A. Yes, sir.

Q. And you have no recollection whatever as to what sort of a report he made?

A. I cannot say what he first reported after he reached here.

Q. Can you give me a general idea of what that report was then?

A. Not from memory.

Q. You keep a record of them?

A. Yes, sir.

Q. Did you bring that report with you here to-day?

A. I did not.

Q. Where is that report?

A. It is in the Nashville office.

Q. In your Nashville office?

A. Yes, sir.

292 Q. When did you see Mr. Holt in person after his trip to Gallatin?

A. I don't remember the day; when he came back to Nashville.

Q. When was that?

A. I cannot say whether it was a week or three days or ten days.

Q. But the first time he returned to the city he called on you at your office?

A. I think he did.

Q. Did you have a conversation with him then?

A. I think I did.

Q. Did you ask him about his success, or did he tell you anything about it?

A. I probably did.

Q. What did he say to you about it?

A. I cannot recall the conversation now.

Q. You cannot give me any of it at all?

A. No, sir.

Q. Did he tell you that he had gotten these men to countermand?

A. He probably did; if he succeeded at that time in countermanding.

Q. Did he tell you how he had gotten them to countermand?

A. No.

Q. You are positive about that?

A. I am positive about that.

Q. You remember, though, now, you are positive he did tell you he got them to countermand?

A. I say I am not positive that he did tell me; I say if he countermanded at that time it was more than likely he told me.

Q. Isn't it more than likely he told you how he did it?

A. No, it is not.

Q. Why is it he didn't tell you about it; what makes you think it is not likely he told you?

A. Well, I think it is, because he probably did not tell me that he had given the oil away.

Q. He didn't report any sales for that day?

A. I cannot say that he did or did not; the report will show.

Q. Your agent, Mr. Rutherford, included with the rest, had instructions, did they not, to be on the lookout for representatives of other oil companies, and report the same to you?

A. No special instructions have ever been issued to that effect.

Q. Now, is it not a fact, on these reports, that they make to you, there is a query on the bottom, or a blank space reserved for information of that character, these daily reports that they make to you?

A. Yes, sir.

Q. What sort of instructions are they given?

A. You mean the agents?

293 Q. Yes, with reference to these parties notifying you if they should happen to run across one; you say they are not given any special instructions; what general instructions are they given?

A. Well, the agent usually, in his desire to hold the trade, notifies

us of any competitor that is getting his trade away from him, and sends the salesman there.

Q. Whether he is traveling in that particular line or not?

A. No, we would send a refined oil salesman in this case.

Q. You have also axle grease men, etc., that come here, too?

A. We have three salesmen that visit Gallatin.

Q. He was the man that notified you, wasn't he?

A. Yes, sir.

Q. That this man was here selling coal oil?

A. Yes, sir.

Q. Now, you say you saw this man maybe three days, maybe a week, or maybe ten days, Mr. Holt, after he had visited Gallatin this time?

A. Yes, sir.

Q. And you talked matters over with him, but cannot remember what was said about his trip to Gallatin?

A. No, I cannot repeat the conversation.

Q. It is a fact, you say, you saw him about every Saturday.

A. Not every Saturday.

Q. Nearly every Saturday?

A. Yes, sir; nearly every Saturday.

Q. And you all would discuss the week's business, and outlook for the next week, wouldn't you, in a general way what was done and what was proposed being done?

A. When he came in the office, I usually had a conversation with him.

Q. Did that with all your salesmen, I suppose, that came in to the headquarters?

A. Yes, sir.

Q. And at no time, you state, did he ever tell you, or did you ask him, how he managed to get these men to countermand these sales here at Gallatin?

A. No, sir.

Q. I believe that you stated to Mr. Vertrees, before noon, that this policy of giving away oil to get men to countermand orders, is foreign to your usual manner of doing business?

A. I think I stated that.

Q. What made it necessary here that such as that should be done here?

A. Do you mean—repeat that question again, please.

294 Q. I asked what made it necessary in the little town of Gallatin, on such an occasion, that such means should be resorted to, in order to get the orders countermanded, if it wasn't the general practice?

See Insert, pp. 294a to 294e.

294a The following is that part of the testimony of J. E. Comer inadvertently omitted from the record in making out the transcript and which should appear in the transcript immediately following volume 2, p. 200, and it is agreed that the same shall be therein set forth and the pages numbered consecutively 294-a, 294-b, etc., until the entire testimony shall be set out, to wit:

"A. The giving away of oil was without the knowledge or consent of the company; I knew nothing of it.

Q. Yet they authorized the agent, the man whom you sent here, that authorized agent you sent here to rectify matters and to hold his trade, is the man who gave this oil away, Mr. Holt?

A. Mr. Holt gave the oil away.

Q. Do you know Mr. Theo. King, the gentleman who was former State Comptroller?

A. I do.

Q. Was it you or some one in your office who notified Mr. King to be on the lookout for these people in order that a license or tax might be collected off of them?

A. I did not ask Mr. King to be on the lookout for any one. As the manager of the Nashville office, I frequently consulted either the county court clerk's office or the comptroller, in reference to privilege taxes. I asked for Mr. King's opinion in this particular case.

Q. You did ask for Mr. King's opinion with reference to the Evansville Oil Company transaction in Gallatin and Sumner County?

A. Yes, sir.

Q. Do you remember when that was?

A. I don't remember the date.

Q. I will ask you if it was not on or about the first of November of last year?

A. I cannot recall the date.

Q. What information did you give Mr. King with reference to the matter, you say you asked him about the case?

A. I gave him no information that I remember now. I believe I asked him if the Evansville Oil Company, or any company from without the bounds of the State, should ship a car of oil to Gallatin and store it, would it be liable for privilege tax?

Q. Didn't you at the same time suggest to him that the Evansville Oil Co. had sent a car of oil to some agent in Gallatin and suggest the payment of a privilege tax or collection of a privilege tax?

A. I made no suggestion to Mr. King.

Q. How did you know the oil was going to be stored here, or sent to some local agent?

A. I don't know how I obtained it, unless it was through one of our representatives, if I knew that.

Q. You knew that was the oil, some of which had been countermanded, did you not, Mr. Comer?

A. I expect I did.

Q. Do you know Mr. Theo. King's signature; you have seen it frequently?

A. I have not seen it frequently; I have seen it once or twice.

Q. Cannot you tell me in the neighborhood of the date you conferred with Mr. King in reference to this matter?

A. I cannot.

Q. What is the capital stock of the Standard Oil Company?

Objected to by the defendants, because incompetent and immaterial, and because abstract of charter of the company previously read by the State shows the amount of same.

Q. What was its capital stock in November, 1903?

A. I don't know what the present capital stock is.

Q. What was it in October, 1903, or what was it the last time you heard from it?

A. They don't advise me of the capital stock.

Q. Then you don't know what the capital stock is now, or what it was in 1903?

A. I believe the original capital stock is one hundred million dollars.

Redirect examination.

By Mr. VERTREES, for Defendants:

Q. You have been asked about a letter that Mr. Holt wrote in to you as to his visit up here and the result. Did that letter make any statement as to having given any oil to induce any one to countermand any orders?

Objection by State. Objection sustained. Exception by defendants.

Q. Did that letter contain any statement or intimation as to the giving of oil to any one at Gallatin to induce him to countermand an order to the Evansville Oil Co. or any one else; the letter
294c I refer to is the letter inquired about in the cross-examination by the Attorney-General about which he cross-examined the witness at length, and by that letter I mean the report he said he made Mr. Holt made to him in the form of a letter or report?

Objection by the State.

By the COURT: Unless you show those letters have been lost or misplaced, I think the original is the best evidence.

Exception by the defendants.

Q. You stated that you had several conversations with Mr. Holt; were they before or after these letters you have referred to?

A. You mean the reports?

Q. Yes, these conversations, were they before or after the report that Mr. Holt sent in?

A. They were after the report.

Q. Now, in any of these conversation-, did Mr. Holt inform you that oil had been given away to any one at Gallatin to induce the countermanding of orders?

A. He did not.

Q. Did you at any time have any knowledge that any such thing had been done them?

A. I did not.

Q. Had you or any one for the company, contracted or authorized any such thing to be done?

A. No, sir.

Q. Did either Holt or Rutherford have any authority to do any such thing?

A. No, sir.

Q. Now, when did you get your first information that that thing had been done?

Objected to by the State because repetition.

A. I stated this morning that the first information was given to me by Mr. Rutherford; I would like to correct that to this extent. Mr. Honeywell, manager of the Evansville Oil Co., was in my office the morning, I think, of the 23rd of December, and he mentioned something about some oil being given away at Gallatin that afternoon. I think it was the evening Mr. Rutherford came down. The first information was given me by Mr. Honeywell, who came into Nashville and to my office, paid me a visit at my office.

Q. Well, what passed between you and Mr. Honeywell?

A. It was simply a friendly visit, I assumed.

294d Q. I mean with reference to this subject?

A. He asked me about countermanding some orders at Gallatin, and I said yes, 'I understand some of your orders were countermanded,' and he said, 'Some oil was given away,' and I said 'I have not heard of it; if any oil was given away I have not been informed of it. Mr. Rutherford is coming down and I shall ask him about it.' I state that merely to be correct in the matter.

Mr. VERTREES, for Defendants: My attention is called to the fact that the answer of the witness is not in the record and to get the benefit of it, I refer to the question ruled out a moment ago, and the jury might retire from the room to get the answer down as he would give it.

By the COURT: You may let it appear that he would state that.

By Mr. VERTREES, for Defendants: That the witness answered that the letter or report contained no such statement; is that correct?

A. None of the reports contained any such statement.

Q. Or any of the letters?

A. None of the letters.

By Mr. PECK, for the State:

Q. That report, I believe you stated, is still in your possession, or a duplicate of it?

A. At Nashville, I assume it is.

Q. I understood you to say to me on cross-examination that it was there?

A. They are a part of our records.

Q. Now, you stated Rutherford brought down a newspaper from Gallatin?

A. Yes, sir.

Q. Containing a published article on this affair. Do you remember what the substance of that newspaper article was?

A. No, I do not.

Q. Have you no idea, cannot give any information?

A. Yes, I think I can give you an idea; I think it related to some court proceedings against the Standard Oil Company for giving this oil away.

Q. I want to ask you this, if that very day, or that night or the succeeding day, there appeared in the Nashville paper, either the *Banner* or the *American*, one of the daily papers of Nashville, a special from Gallatin, with reference to this matter, and if there was not an interview given by you, published by the reporter following immediately under that special from Gallatin, in which you denied it all, said there was nothing in it, that it was a mere bugaboo?

A. No, I never denied it at all, and I don't remember the dates as to the newspaper interview.

Q. But did you give the interview?

A. The interview that you refer to, I think I can give you a synopsis of it. I was called up out at home some evening, I don't know what evening.

Q. I did not ask you about that; I don't care for that.

A. I am telling you about the interview; the reporter of the *American*, I think, said: 'This is the *American* office,' and I think I asked if it was Mr. Burch.

By Mr. VERTREES, for Defendants:

Q. You mean called you up by telephone at your home?

A. Yes, sir, by telephone out in the country, and I think his question was, first, if we had given away any oil and I said no. I said, 'I don't care to discuss this in the newspapers.' He said, 'Well, would you approve anything of that kind?' and I said, 'No, but I don't care to discuss it in the newspapers.' I did not say there was nothing in it.

Further this deponent saith not.

(Signed)

J. E. COMER."

Agreed to.

CHARLES T. CATES, JR.,

Attorney-General.

JOHN J. VERTREES,

Solicitor for Standard Oil Co.

Deposition of J. M. Whitesides. Filed July 10, 1907.

(Tr., Vol. 2, p. 201.)

Notice.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY.

Executed by making the contents of the within notice known to W. A. Guild, Attorney, and leaving a copy of same with him. This

the — day of July, 1907. Service of this notice accepted, July 5, 1907.

W. A. GUILD, *Attorney.*

Notice.

STATE OF TENNESSEE *ex Rel.*
versus
STANDARD OIL COMPANY.

To W. A. Guild, Attorney for Complainant:

On Wednesday, July 10th, *July 7th*, at 9 o'clock a. m., in the Clerk and Master's office in Gallatin, Tennessee, the defendant will proceed to take the deposition of James D. Whitesides, to be read as evidence for the defendant in the trial of the above cause, pending in the Chancery Court of Sumner County, Tennessee.

Said depositions will be continued from day to day until finished.

VERTREES & VERTREES,
JAS. W. BLACKMORE,
Solicitors for Defendant.

Filed July 10th, 1907, J. D. G. Morton, C. & M.

STATE OF TENNESSEE *ex Rel.*
versus
STANDARD OIL COMPANY.

The deposition of J. D. Whiteside, a witness for the defendant, taken upon notice, at the office of the Clerk and Master in the courthouse at Gallatin, Tennessee, on Wednesday, July 10th, 1907.

295 The said taking was set for 9 o'clock a. m., but at that hour was, by consent, continued until 4 o'clock p. m., when the said deposition was commenced.

Present for the defendant, Jas. W. Blackmore, Esq.

The said witness, being first duly sworn, deposed as follows:

By J. W. BLACKMORE, Esq.:

Q. 1. State your age, residence and occupation?

A. I am 49 years old, Gallatin is my home, and I am a trader and dealer in horses.

Q. 2. Were you ever in the employment of the Standard Oil Company; if so, when and how long, and where?

A. I was in the employ of the Standard Oil Company here at Gallatin, I don't remember how many years, but from five to eight years. I quit them, I reckon, four or five years ago—I don't exactly remember the date.

Q. 2½. In what capacity were you employed by said company, and what were your duties?

A. I was their agent here. And my duties were to receive the oil and send it out; look after the filling of barrels and cooping, and delivering oil in barrels and out of the tank wagon, too.

Q. 3. You were, then, what is called the local agent of the company at Gallatin, Tennessee?

A. Yes, sir.

Q. 4. While you were such agent of said company at Gallatin, did you or not deliver oil to customers in tank wagons in Gallatin, and points in the surrounding country?

A. I did.

Q. 5. To what points or places did you deliver oil outside of Gallatin, and what was the distance of these places from Gallatin?

A. Dixon Springs is one of the farthest points I went, on the Hartsville pike, and intermediate places; then to Westmoreland, out the Scottsville pike to Westmoreland, and intermediate points; Hendersonville and intermediate points; Shackle Island and intermediate points; Cottontown and intermediate points; went to Westmoreland about half the year—couldn't get there the other half of the year, on account of the roads. To Dixon Springs it was 23 miles; to Westmoreland, 18; to Hendersonville, 11; to Shackle Island, 11 or 12, I have forgotten which; to Cottontown, 7; then Portland, 17. When I said I went to Westmoreland about half of the year above, I should have said Portland.

Q. 6. When did you cease to be such agent for the Standard Oil Company, at Gallatin, Tennessee, and who succeeded you in this agency at that place?

A. I would say it was four or five years ago; about five years, I guess. O'Donnell Rutherford.

296 Q. 7. Did you reside in Gallatin, Tennessee, during the time that you were the agent of this company?

A. I did.

Q. 8. How long did O'Donnell Rutherford continue to be such agent for the Standard Oil Company at Gallatin, and did he reside there during the time he was such agent?

A. I would think three or four years. He did.

Q. 9. Who succeeded O'Donnell Rutherford as local agent of the Standard Oil Company here, and when?

A. William Baber; I think he has had it around a year.

Q. 10. Has William Baber lived in the town of Gallatin or in its vicinity during the time that he has been agent for the Standard Oil Company?

A. He has.

Q. 11. During the time you were agent of the Standard Oil Company at Gallatin, to whom did you report?

A. I reported to the office at Nashville. Mr. Clark was the special agent there, and, after he died, Mr. Coons took it, and then Mr. Comer.

Q. 12. Did you have any directions during your agency at Gallatin of the Standard Oil Company to give away oil to customers to obtain patronage, or to destroy competition?

A. No, they never intimated anything of that sort for me to do.

Q. 13. Did you ever do this while you were agent?

A. I never gave a gallon away while I was agent.

Q. 14. Did you know of any unfair, illegal, or unusual business methods or devices resorted to by the Standard Oil Company at Gal-

latin' to obtain custom, or to destroy competition while you were its agent?

A. None whatever.

Q. 15. Did you personally know J. E. Comer, agent for the Standard Oil Company, at Nashville, Tennessee?

A. I can't say that I personally knew him, but I have been in the office repeatedly, and talked to him on business from time to time, and knew him well in a business way.

Q. 16. Was there any employee in Mr. Comer's office that you did know personally, and, if so, what was the name of that employe, and what were his duties in Mr. Comer's office, if you know?

A. I knew Mr. Lassiter very well, the stock man of the house, and I knew a Mr. Wilson there, one of the head men of the business, very well indeed. I think he looked after the correspondence a good deal, and kept tab on the local agents out of the town.

Q. 17. Did you or not ever have a conversation with this Mr. Wilson about the alleged giving away of oil in Gallatin, Tennessee, to Love and others, by Rutherford, the local agent at Gallatin; if so, when was this conversation, and where, and what was said by you and him in regard to this matter?

A. I did. Why, I don't remember what year it was in, but it was about the time that the Gallatin News was writing up the Standard Oil Company about giving away this oil. I was coming through Nashville—had been below there, and was coming through, and met Mr. Wilson at the Union Station at Nashville. I had got Mr. Rutherford this position here with the Standard Oil Company, after I resigned, and I felt an interest in him, and I asked Mr. Wilson, when we met, how O'Donnell was getting on up here with his oil business, and he made this remark to me, "Why, Jim, that boy is way short in his accounts;" told me how many gallons, but I have forgotten how much it was shortage, and I said to him, "Probably I can explain some of this to you." I told him that his man Holt had come up there several months before that—two or three months before that—and had give a lot of oil away, and told Rutherford to carry it on as stock, and that he would pay him for it, and that Rutherford told me about the time that Holt was here and gave away this oil about the transaction, and I told Rutherford to go and report this oil to the Standard Oil Company, that if an auditor would come along here and check him up, he would catch him in a bad shape. I also told Mr. Wilson that the papers here were writing him up in regard to it. He asked me to see Mr. Rutherford, and to send him to Nashville the next day. When I got home that night I met Mr. Rutherford at the depot, and told him what Mr. Wilson said, and also told him that they wanted him to come to Nashville the next day, and bring a copy of the newspapers with him. Mr. Wilson told me that night that Mr. Holt had no more right to give away this oil than I would have had, or something to that effect.

Q. 18. Now, what season of the year was it that you had this conversation with Mr. Wilson?

A. Mr. Blackmore, this was just two or three days before Christmas, or Christmas eve—the reason I remember this, Mr. Wilson was at the depot that night to bid a friend good-bye that had been work-

ing for Mr. Guerst, a Mr. Turner. Mr. Turner was going back North. I remember it was just before the holidays.

Q. 19. Did you meet Mr. Wilson on this occasion by accident or by appointment?

A. Met him by accident.

Q. 20. Had you ever told Mr. Wilson, or communicated this fact of the giving away oil here, to any other official or employé of the Standard Oil Company before the date of this conversation with Mr. Wilson that you have just detailed?

A. I have not. And never said nothing to him about it since.

Q. 21. Have you ever been in the employment, or had any
298 connection with the Standard Oil Company since you ceased to be its local agent here?

A. I have not, sir.

Signed, subject to cross-examination.

J. D. WHITESIDE.

Witness claims one day attendance.

Subscribed and sworn to before me this July 10th, 1907.

J. D. G. MORTON, C. & M.

Filed July 11th, 1907.

J. D. G. MORTON, C. & M.

Witness J. D. WHITESIDE, being recalled for cross-examination, on Thursday, July 11th, 1907, at 4 o'clock p. m., present J. W. Blackmore, Esq., for defendant, and Wm. A. Guild, Esq., for complainant, deposed as follows:

By Mr. GUILD, for Complainant:

Q. 1. Who is the President of the defendant, Standard Oil Company?

A. I have understood Rockefeller was.

Q. 2. What was the capacity of the Standard Oil Company's tanks at the warehouse owned and occupied by them in October, 1903, at Gallatin, Tennessee?

A. I didn't have charge of the company's business here at that time. I once knew what the capacity of the tank here was, but I have forgotten.

Q. 3. Had there been any change in the capacity, or the number of tanks from the time that you left the employment of defendant up to October, 1903?

A. None that I know of.

Q. 4. What was the average supply or quantity of coal oil kept on hand at Gallatin, Tennessee, by you, and also Mr. Rutherford?

A. Part of the time when I was their agent here they had only one storage tank, and after that they took a couple of these railroad tanks that go on cars, and made storage tanks out of them also. At one time I knew the capacity of each and every one of them, but I have forgotten. Six or seven thousand gallons, I would think, would be an average. I think these railroads tanks would hold five thousand or six thousand; I have had them to hold as much as seven thousand gallons. We tried to keep as much as a tank on hand.

Re-examination.

By Mr. BLACKMORE, for Defendant:

Q. 5. Do you know, of your own knowledge, how much
299 oil was on hand or in the tanks at Gallatin, Tennessee, in
October, 1903, or that the company had any in storage at
Gallatin, at that time?

A. I do not.

J. D. WHITESIDE.

Sworn to before me this July 11th, 1907.

J. D. G. MORTON, C. & M.

Stipulation. Filed October 28, 1907.

(Trans., Vol. 2, p. 214.)

In the Chancery Court of Sumner County, Tennessee.

STATE OF TENNESSEE on Relation of the ATTORNEY-GENERAL
versus
STANDARD OIL COMPANY OF KENTUCKY.

Rule No. 237.

In this cause it is stipulated and agreed as follows:

1. That the stipulation heretofore made and entered into in this cause, setting forth and showing that the Standard Oil Company, O'Donnell Rutherford and C. E. Holt, were indicted in the Circuit Court of Sumner County, Tennessee, and setting forth the indictment in the case called the "Love case," and which stipulation, signed by counsel, is dated the 2d day of July, 1907, and was filed in said Court on the 5th day of July, 1907, is here referred to and made a part of this stipulation.

2. O'Donnell Rutherford therein mentioned was examined as witness by the defendant on the trial of the above entitled case in the Circuit Court of Sumner County, Tennessee, on the 20th day of September, 1904, and that he then and there testified, after having been duly sworn, as stated and shown in the copy of his evidence then given, hereto attached as Exhibit No. 1, as and made a part hereof.

3. That the said O'Donnell Rutherford is dead, having died on the 20th day of August, 1907.

4. That this stipulation and any part thereof, with its exhibit, may be read as evidence on the trial of this cause, by either party, subject only to the right of exception for incompetency of the particular matter or fact which may be excepted to as evidence of the hearing, and also to the right of the State to except to the evidence of said Rutherford, exhibit hereto, upon the ground that said evidence given by him in that case on that trial, is not admissible as evidence in the present case, even though the witness has since died.

5. This stipulation shall be filed as a part of the record in this case.
- 300 Agreed to and signed by counsel on this the 19th day of October, A. D. 1907.

CHARLES T. CATES, JR.,
Attorney-General for the State of Tennessee.
JOHN J. VERTREES,
Solicitor for Defendant.

Deposition of O'Donnell Rutherford, Exhibit No. 1 to Stipulation.

(Trans., Vol. 2, p. 217.)

O'DONNELL RUTHERFORD, one of the defendants, being first duly sworn, deposed as follows:

Direct Examination.

By Mr. SEAY, for Defendants:

- Q. Your name is O'Donnell Rutherford?
- A. Yes, sir.
- Q. Where do you live?
- A. In Gallatin.
- Q. In what business are you engaged?
- A. I am agent for the Standard Oil Company.
- Q. Any other business?
- A. Rural carrier.
- Q. What is your age?
- A. Twenty-two years.
- Q. When were you twenty-two?
- A. In February.
- Q. How long have you been representing the Standard Oil Company as agent?
- A. About a year and a half.
- Q. Will you state the order of business usually followed in the sale and delivery of oil at this time?
- A. Yes, sir; I am employed to run the tank wagon, and to run the warehouse over here.
- Q. Does the Standard Oil Company have a warehouse over here?
- A. Yes, sir.
- Q. And keeps oil in storage here?
- A. Yes, sir; in tanks and barrels.
- Q. They also have what they call a tank wagon?
- A. Yes, sir.
- Q. That is the property of the Standard Oil Company?
- A. Yes, sir.
- 301 Q. You take the oil from the tank and put it into the wagon and deliver it to the merchants, from time to time?
- A. Yes, sir.
- Q. Do you also solicit orders?
- A. Yes, sir.

Q. Do you work on salary or commissions?

A. Upon commissions.

Q. I will get you to state to the jury what you may know, if anything, about the giving away of 100 gallons of oil to S. W. Love, in October, last, and what instructions you received in reference thereto and from whom?

A. The first I knew Mr. Holt was here and told me.

Q. Who is Mr. Holt?

A. Representing the Standard Oil Company. He is the Standard Oil Company's salesman. He visits this town.

Q. Does he check up your business?

A. Yes, sir; and sees that the deliveries are right.

Q. And issues orders to you?

A. Yes, sir.

Q. Now, go on and tell what happened?

A. The first I knew, there was a man in here selling oil, and there was a man in here the same day representing the Standard Oil Company, selling lubricating oil and axle grease, and he says, "I notice you have a man here selling coal oil," and I asked him who it was, and he showed me a little pamphlet this fellow was giving around and said, "I do not know whether he has sold any or not," and I told him I did not know anything about that; and a few days after that Mr. Holt came up here. I went out on my route one morning, and got back about one o'clock. I saw Mr. Holt after I got in, and he told me—he said you have let a man come in and sell your trade oil, and I said I did not know he sold any, but I knew he was here; but I did know one or two parties he had sold, but had not looked it up; and he said he sold Mr. Sy. Love, and he countermanded his order and agreed I would give him 100 gallons; and he said not to make any ticket or charge whatever. And I told him I would do it. He told me that he would pay for it. Not to make any ticket of it, that he would pay me himself?

Q. What else?

A. So, Mr. Love didn't get the oil for a week or ten days afterwards, possibly, and got a hundred gallons at one time.

Q. Did you have anything to do with that Love countermand of his order?

A. Not a thing in the world. I didn't know anything about it.

Q. Did you enter into any conspiracy with the Standard Oil Company, or Love, or any one else, for the purpose of controlling the market?

A. No, sir; I didn't know anything about it. I didn't know Mr. Holt was in town, but I did tell my driver to put it in his tank.

Q. You didn't even deliver it?

A. No, sir; Mr. Holt instructed my driver, in my presence, to deliver it and not collect for it, and I told him also to do it.

Objection by the State to the question asked as to the conspiracy, etc.

By Mr. SEAY, for Defendants:

I now propose to ask him, Did you enter into any conspiracy or

bargain of any kind to control the price or affect the oil market as charged in the indictment?

By the COURT:

I don't think that would be competent.

Exception taken by defendants.

By Mr. VERTREES, for Defendants:

Q. How long have you known Mr. Holt?

A. About two years. I think he has been making this town about two years.

Q. He is a traveling salesman, is he not?

A. Yes, sir.

Q. And if he sells oil and gives you an order on you for delivery, you deliver it to whosoever he says?

A. Yes, sir.

Q. Do you sell oil, yourself, also?

A. Yes, sir.

Q. From whom are the prices received?

A. From the Nashville office; Mr. Comer sends me the prices.

Q. Neither you nor Mr. Holt have anything to do with that?

A. No, sir; I have not. I don't know that Mr. Holt has.

Q. He has not, to your knowledge, has he?

A. No, sir.

Q. Well, now, the Standard Oil Company maintains a station here at Gallatin, doesn't it?

A. Yes, sir.

Q. And the tank wagon—that means an oil wagon—is hauled around and delivers the oil at the doors of the merchants, does it not?

A. Yes, sir.

Q. How far out from Gallatin does the wagon go?

A. I think Dixon Springs is the farthest trip we make—twenty-two or twenty-three miles.

303 Q. Goes out to the country merchants everywhere and delivers them oil?

A. Yes, sir; everywhere we can get to.

Q. Has the Evansville Oil Company got a station here or a tank wagon?

A. No, sir; they have not.

Q. Now, if I understand you, it is the very evening of the transaction with Mr. Love that Mr. Holt told you about giving away the oil?

A. Yes, sir; that evening. He went to the country afterwards, he told me, along between twelve and one o'clock, about this transactions he had made with Mr. Love, and said he was going to the country, to Bethpage; heard he had sold some oil up there, and he was going up there to look after it, and he told me of one or two others—I think he said Mr. Cron and one or two others.

Q. And did he say, whenever they wanted the oil to deliver to them as they wanted?

A. Yes, sir.

Q. And, as I understand you, it was then he told you not to make any ticket, but he would pay it by the last of the month?

A. He told me he would pay what he delivered to Love, and not to make any ticket; that was all he told me he had given away—that hundred gallons—and he would pay it by the last of the month, and I could make a ticket of it then to Mr. Love, and mark it paid, and I could also get my commission out of it for delivering the oil, which would have been fifty cents.

Q. Well, now, what happened between you and the company with respect to the oil?

A. He went on and gave away three hundred gallons—fifty to Mr. Hunter and fifty to Mr. Lane, and a hundred to Cron, and this to Mr. Love.

Q. Did he make the same statement as to that?

A. Yes, sir; as to all of them; that he didn't want me to lose a copper, not even my commission, and that he would pay me for the oil, and I could make the tickets out regularly, like I always do for oil, send in the money and get my commission the same as I do on all other oil. That was in October, but I know I delivered part of the oil and a part in November. He told me before he went, and showed me how to take my inches, for fear he didn't come back, so if I had delivered any of the oil, I could report an inch or a half an inch more than I had, to keep from showing a shortage; that was in October. I had already delivered a hundred and fifty barrels in October, and the balance in November, so he didn't come back at all in October. He was here in November, and he didn't pay me for the oil at all, and didn't say anything more about it, so I delivered the balance in November, and at the end of November I took stock and showed exactly what I had on hand.

Q. That was when?

A. That was the end of November, and I showed a shortage of three hundred gallons, and they wrote me a letter about the 6th or 7th of December; said I was three hundred gallons short, and asked me to explain it.

By Mr. PECK, for the State:

Q. Have you that letter?

A. No, sir; I expect I burned it up, or threw it away.

Q. I expect you burned it up?

A. I don't know; I might find it.

By Mr. VERTREES, for Defendants:

Q. Do you preserve all your letters, or throw them away?

A. No, sir; I throw them away. It would take a bushel basket to keep them.

Q. Do you think that one has disappeared?

A. Yes, sir; I expect it is.

Q. State its contents?

A. I know I didn't answer the letter, and didn't pay any attention to it at all.

Q. What did the letter say with reference to this oil or shortage?

A. Told me I would have to pay for it; they would have to charge it to my account, and I made sure Mr. Holt would fix it, and would not let me lose forty dollars and fifty cents.

Q. You didn't answer that letter?

A. No, sir; I made sure he would fix it; thought maybe they would write him about it, too, and I would not have to pay it, and they wrote me another letter about it, and it was getting along towards Christmas, and I needed a little money, and I went and called him up over the telephone, and asked why he didn't send the money, and I needed it.

Q. Called whom?

A. Called Mr. Wilson, the assistant, and he said, "You have never answered my letters about the shortage, and I can not pay you until you fix that up, and you didn't answer either one of my letters;" so, I told him I would come down there the next day; and along about the next day I went down and told him Mr. Holt gave away that three hundred gallons up here, and told me he would pay me for the oil, and not to make a ticket for it, but he would pay me, and I could send it in, and I told Mr. Comer, and he jumped on me, and he said it was in my charge, and I had no right to give it away without orders, and he was going to make me pay for it, and he did make me pay for it.

305 Q. He charged it up to you, did he?

A. Yes, sir.

Q. And retained it?

A. Out of my November salary, yes, sir; forty dollars and fifty cents. I tried to get him not to make me pay for it. I needed the money, but I couldn't do it.

Q. When do you think that was, Mr. Rutherford?

A. That, I think, was on the 22d or 23d of December, I went to the Nashville office.

Q. It was close to Christmas?

A. Yes, sir.

Q. Had you ever, up to that time, told any of the superior officers of the company—Mr. Comer, or any one—about the transaction?

A. No, sir.

Q. Had you told any one about it?

A. I told Mr. Whitesides, here in town, about it.

Q. What Whitesides is that?

A. Jim Whitesides, used to be agent.

Q. He wasn't connected with the company then?

A. No, sir; I just told one or two here about it. There was a lot of people knew about it around here.

Q. I was on the question whether you ever communicated it to the company in any way?

A. No, sir; I had not. That was the first they knew anything about it, when I told them.

Q. And he declined, as I understand you, to consent to it, or to send your commissions to you, or pay you, until this shortage was straightened out?

A. Yes, sir.

Q. And then it was you went down and told them exactly how it was?

A. Yes, sir.

Q. And they said you had to pay for it, and retained it?

A. Yes, sir; they took it out of my pay, and, a day or two afterwards, sent me my check for the balance.

Q. Did you use the words, Mr. Comer jumped on you, or disapproved of it?

A. Yes, sir; he jumped on me, and said I had no business to do it; I had no right to deliver it unless I got pay for it, and I told him I thought Mr. Holt was my boss, and I had a right to do it.

Q. But, still, he made you pay for it?

A. Yes, sir.

Q. And Holt didn't have that authority?

306 A. Yes, sir; he said no one else but him had authority to do that.

Q. That is, Mr. Comer, this gentleman sitting here?

A. Yes, sir.

By Mr. SEAY, for Defendants:

Q. About this writing with Mr. Lane, in whose handwriting is that?

A. I signed it. Mr. Lane wrote it out. He called me over there.

Q. Mr. Holt sent you over there?

A. Yes, sir.

Q. And told you what to do?

A. Yes, sir. He said, "you are just fooling me, and getting me to countermand," and I said, "You know if he says he will deliver it, I will take it on myself, if he says so."

Q. What you did was acting under instructions from Mr. Holt?

A. Yes, sir.

Q. You say you were acting under instructions from Mr. Holt. What do you mean?

A. He told me to go over and give him fifty gallons of oil.

Q. Hadn't this happened between you, that Holt said to you, Lane had not bought any, that he told him so?

A. Yes, sir; he told me that day he had bought some, and while Holt was out in the country I was talking to Mr. Lane, and he had been having a talk with Mr. Cron, and told him what proposition Holt had offered him, and he said he would countermand if he did the same thing with him.

Q. As I understand you, that proposition of countermand was brought up by Mr. Lane himself?

A. Yes, sir; and wanted me to agree then I would give it to him that very evening; and I told him I would not; I had nothing to do with it; if Holt wanted to give him the fifty gallons, he could do so.

Q. And you told Holt what he said?

A. Yes, sir. Mr. Lane wanted a hundred at first.

Q. But you settled on fifty?

A. Yes, sir. Holt said a hundred, said a hundred was too much for a man who just bought five barrels.

Q. Mr. Holt didn't tell you to give a guarantee?

A. He didn't tell me to give a guarantee, but I said I would deliver it.

Q. This was done on your own motion?

A. Yes, sir; he wrote that out there and asked me to sign it, and I said I would guarantee I saw it delivered.

Q. No one had authorized or said anything about guaranteeing it before, had they?

307 A. No, sir.

Q. Not even Mr. Holt?

A. No, sir; but I knew if he said he would give it to him he meant it.

Cross-examination.

By Mr. PECK, Attorney General:

Q. Then you did sign it?

A. Yes, sir.

Q. Who did you say wrote it?

A. Mr. Lane wrote it?

Q. Where?

A. Over at his store.

Q. You say he wanted a hundred gallons?

A. Yes, sir; he did.

Q. What did he say; what did you say?

A. I said I would take the oil.

Q. Did you see Mr. Holt?

A. Yes, sir.

Q. What did Mr. Holt say?

A. He said, give him fifty.

Q. A hundred was too much?

A. Yes, sir; said he had already given away a hundred and fifty, and didn't want to spend too much money on the little transaction.

Q. It was in the afternoon, between twelve and one o'clock, Holt saw you and told about this to Love?

A. No, sir.

Q. It wasn't at night?

A. It wasn't at night when he told me about that; it was night when he told me he had done it with Mr. Cron. He made Mr. Cron a proposition before he left town, but he didn't accept it until that night, after he came back; he had to study over it; he belongs to the church.

Q. He had to study over that to see if he could do that and still retain his church membership?

A. Yes, sir.

Q. You say you had been in the employ of the Standard Oil Company about two years?

A. I have been agent myself about a year and a half, but I worked under Mr. Whitesides for four years; but I wasn't the agent.

Q. During the time you have acted as agent for a year and a half, did you ever have a shortage in your inches?

A. Yes, sir.

308 Q. How often?

A. I think it happened once or twice before that. Once before that and maybe once since. I had a shortage last month.

Q. When it was short the first time, did they write to you?

A. Yes, sir.

Q. How much were you short?

A. I don't remember.

Q. How much were you short; don't you know?

A. I paid them three times for shortages.

Q. What did you say to them about that?

A. I told them I could not explain it; I would have to pay for it.

Q. You replied to their letter, did you?

A. Yes, sir.

Q. Replied promptly?

A. I don't know about that.

Q. What do you think about that?

A. I don't know how prompt I was.

Q. But you did reply to that letter?

A. Yes, sir.

Q. And you also replied to the letter about the last shortage didn't you?

A. No, sir.

Q. You say that was last month?

A. Or month before last, I forget which. It was twenty-six dollars; I know that.

Q. Now, you say Mr. Holt came up here in November?

A. Yes, sir; he was here some time in November.

Q. You say you delivered a hundred and fifty gallons of this in the month of October?

A. Something like that; I couldn't say positively, about a hundred and fifty in November.

Q. When did these people first write to you about the shortage in inches?

A. Well, it was in November, along from the first of November, just as soon as they checked me up. I sent in my report on the last of October, and I heard from them along about the third or fourth of November.

Q. You made no reply to that letter?

A. No, sir.

Q. When did they next write to you?

A. They wrote me next—I mean to say December, when I showed the shortage, when I sent in my report, on the last of November, I showed the shortage. I didn't show any shortage in October; showed the shortage in November. I counted the oil as more oil than I actually had on hand.

309 Q. Then it was in your final report of November the shortage first appeared?

A. Yes, sir.

Q. They wrote you about——

A. No, sir.

Q. You didn't make any reply?

A. No, sir.

Q. Why didn't you?

A. I wanted to hear from Holt. I didn't want to tell on him. He asked me not to tell them, or any one else; to be sure not to, and showed me how to report my inches without letting them know about it.

Q. When did you next see Holt, after you first reported your loss of oil?

A. You see, I reported it in December. I wrote him a letter, and told him they made me pay it, and I wanted him to send me the money.

Q. Where did you write to him?

A. At Nashville, care of Standard Oil Company.

Q. Did you hear from Holt in regard to that letter?

A. No, sir—yes, I did.

Q. Which was it, now, did you or not?

A. Yes, sir.

Q. Did he come to you about it?

A. He didn't then.

Q. I believe you said when he first came here—that is, the time oil was given away, he told you he would make it good, and save you from any shortage in inches; would make it good by the end of that month; didn't he tell you that?

A. Yes, sir.

Q. He didn't do that?

A. No, sir; I hadn't delivered all of it in October, and he told me, for fear he didn't get back in that month; told me what to do if he didn't get back.

Q. Now, he came back in November?

A. Yes, sir.

Q. And I believe you said he didn't pay you?

A. No, sir.

Q. And you didn't say a word to him about it?

A. No, sir; I hadn't showed any shortage.

Q. You didn't discuss it.

A. I told him I didn't deliver all of the oil.

Q. Didn't you say you didn't say a word?

A. No, sir.

Q. About a shortage?

310 A. No, sir. I said I hadn't showed the shortage in October; but I did tell him when he was here in November I had to look at all of the oil.

Q. Didn't you say awhile ago that you didn't say a word about his making good the shortage in November?

A. No, sir.

Q. You swear you didn't state that?

A. I swear I didn't say anything to him you say. I swear I did tell him about it, and he didn't—I didn't say anything about making good, because I wasn't short.

Q. You said nothing about his complying with his promise?

A. He said he was going to do it.

Q. Didn't you say he didn't mention it to you, or you to him? About paying you the money and making good the shortage?

A. About the paying of the money?

Q. Yes.

A. I don't know whether I mentioned that or not. I thought he would pay me without me saying anything about it to him. I don't know whether I told him to pay me or not, but I know I told him I delivered the oil.

Q. Although he had failed to comply with his promise to pay you by the end of October, when he came here in November, you didn't say anything to him about it?

A. I told him I had delivered the oil.

Q. And he said nothing about making good this promise?

A. I don't know whether I did or not. I hadn't had to pay for it then.

Q. He has never paid you to this day, has he?

A. No, sir.

Q. Did you pay that?

A. Yes, sir.

Q. When did you pay it?

A. Paid it in December; it came out of my November salary.

Q. When was it you say, about Christmas, you called them up and asked why they didn't pay you?

A. I don't know, sir. I went down to Nashville a day or two after I called them, and that was on the 22d or 23d I went to Nashville. I know it was along a day or two before Christmas.

Q. Didn't you know why they were not sending it?

A. Yes, sir.

Q. Then why did you call up to know why?

A. I wanted them to send it.

Q. That was forty dollars and what?

A. Forty dollars and fifty cents. Three hundred gallons at thirteen and a half cents.

311 Q. Who was it that wrote you from the Nashville office, Mr. Comer, or Mr. Wilson, or who?

A. Mr. Comer's name was signed to it that told me I was short, but Mr. Wilson, I think, attends to that stock book, but when he writes a letter he signs Mr. Comer's name as Special Agent.

Q. Then the letter you received had the name of Comer on it?

A. Every letter I received from there had Mr. Comer's name to it. Sometimes he has never seen that, and knows nothing about it.

Q. Mr. Rutherford, did it strike you as anything unusual when this man Holt told you he had given this man a hundred gallons of oil, and these other men as much as fifty, and so on?

A. Yes, sir.

Q. You thought it was unusual?

A. Yes, sir.

Q. Did you ask why he did it?

A. Yes, sir.

Q. Did he tell you?

A. Yes, sir.

Q. Why?

A. Because they countermanded the orders.

Q. And that was what he gave them the oil for?

A. Yes, sir.

Q. To countermand the orders given to the Standard—I mean, to countermand the orders given to the Evansville Oil Company?

A. Yes, sir.

Q. And you told no one about the shortage in your inches—no superior officer—until you went to Nashville and told Mr. Comer?

A. No; they knew I was short.

Q. And the reason why you did not answer them and the reason—but you say you knew they did not?

A. No, sir; I knew they didn't, or thought they didn't.

Q. But in all other cases you were very prompt to answer and get matters straightened out?

A. Sometimes. I had never been short but about twice in all. I showed gains and losses sometimes.

Q. You lived in Gallatin all of the time?

A. Yes, sir; I have lived here about twelve years.

Q. At the time you went to Nashville just before Christmas to see Mr. Comer, hadn't this matter, or articles bearing upon this matter, been published in both the Nashville and Gallatin papers?

A. I think it was along about that time. I don't know whether it was before or after. I know one reason the people all commenced talking about the matter around here, and I thought I had better tell him about it, so I could get my money. I knew if the papers got hold of it he would know it anyway.

312 Q. Didn't Mr. Comer say to you that he had seen something in the paper, and ask you about those newspaper reports?

A. No, sir; I carried the paper down there, and showed it to him. It was the Gallatin Semi-Weekly News.

Q. And it was also published in the Nashville papers?

A. Hadn't been up to that time, I had seen. I know it had not.

Q. But you did carry one of the Gallatin papers with you?

A. Yes, sir, I did, and showed it to him.

Q. And that was before the 24th of December?

A. I don't know. It was along about the 22d or 23d when I went down.

Q. And that was when you showed it to Mr. Comer?

A. Yes, sir; I had it with me, and showed it to him. I had a Semi-Weekly News, and carried it and showed it to him.

Redirect examination.

By Mr. VERTREES, for Defendants:

Q. As I understood you, there were two occasions when there was a shortage in the inches, when you didn't know how it occurred?

A. Yes, sir.

Q. And you said nothing about it; just had it to pay?

A. Yes, sir. Some months I would show a shortage, and then, again, show a gain.

Q. But you did understand what this shortage was?

A. Yes, sir.

Q. And you were relying on the promise of Holt, and expecting Holt to settle for it?

A. Yes, sir; I stated that on the stand before.

By Mr. SEAY, for Defendants:

Q. Do you have to stand the loss in leakage and the loss in measuring, and everything of that kind? They make you stand all that?

A. Yes, sir.

Recross-examination.

By Mr. PECK, for State:

Q. Mr. Rutherford, you say Mr. Roseman, this representative of the Evansville Oil Company, when he came back here in the month of December, say you, you saw him there, didn't you?

A. Yes, sir.

Q. I will ask you if or not you met him over here on the street, in front of or near Levy's dry goods store, somewhere along there, and if you didn't tell him on that occasion that if they, or
313 his Evansville Oil Company, would get the oil away from here, that you would see that he didn't have to pay any license?

A. I don't remember anything of the kind, no, sir. I remember having a conversation with him below the Methodist Church; he says it was a hundred and twenty-five feet below the Trousdale Hotel.

Q. You didn't have any such conversation with him over there, then?

A. I don't think I did. I would not be positive about it. Surely, I didn't expect him to pay the license unless he sold the oil.

Q. You also told him on that occasion you had to pay for that oil?

A. I told him that at one time I did.

Q. He wasn't here except that trip?

A. I don't remember talking to him except down below the Trousdale Hotel.

Q. You told him you had to pay it?

A. I told him I had it to pay. He jumped on me about giving it away, and I said I had nothing to do with it.

Q. And that was some time before you had been to Nashville to see Mr. Comer?

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A. I don't know, sir, when it was; and I told him one time they charged it to me—to my account.

Further this deponent sayeth not.

In the Chancery Court of Sumner County, Tennessee.

No. 237.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY OF KENTUCKY.

The depositions of C. E. Holt, C. T. Collings, S. F. Wilson, Charles T. Cates, Jr., and John J. Vertrees, taken upon notice on this the 19th day of October, A. D. 1907, at the office of John J. Vertrees, Nashville, Tenn., to be read as evidence on the trial of the above entitled cause, on behalf of defendant.

Taken in the presence of General C. T. Cates, Jr., Attorney-General of the State of Tennessee, representing the complainant; and John J. Vertrees, representing the defendant; and Buford Duke, stenographer and Notary Public.

Caption, certificate and all formalities expressly waived, and it is agreed that the Stenographer, who is a Notary Public, may swear the witnesses, take down their depositions in shorthand, transcribe the same into typewriting, and sign the name of the witnesses to their respective deposition, the signature of the witness thereto being expressly waived.

Deposition of C. E. Holt. Filed October 28, 1907.

(Trans., Vol. 2, p. 253.)

Said witness, C. E. HOLT, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. State your name and your place of residence?

A. Clarence E. Holt, Skiatook, Indian Territory.

Q. What is your age?

A. Thirty-two years.

Q. How long have you lived at Skiatook?

A. Four months.

Q. Where were you born and raised?

A. In Amos County, Virginia.

Q. Did you ever live in Tennessee; if so, when, and for how long a time?

A. I lived in Tennessee, at Lebanon, for two years, and in Nashville, five or six years.

Q. Were you ever connected in any way with the Standard Oil Company, the defendant in this cause?

A. Only as a salesman.

Q. You were, though, connected with it as a salesman?

A. Yes, sir.

Q. When, and how long?

A. As a salesman, I think, for five years.

Q. In what territory were you a salesman?

A. Why, I was a salesman in Middle Tennessee, the territory comprising the counties in Middle Tennessee; that is, I traveled within a radius of about a hundred miles out of Nashville.

Q. Is Sumner County, in which Gallatin is situated, within that territory?

A. Yes, sir.

Q. What were your duties as salesman?

A. My duties were to sell special goods, such as candles, axle grease, heaters, lamps, and to call on the trade in regard to the service that our agents were giving them at the various points where we had sub-stations, finding out whether or not the agent was attending to his duties in delivering oil promptly, and if they had
315 any complaints to offer against the agent's inattention, and to go down to the station or warehouse, where the tanks were located, and look over the storehouse to see if everything was in order, like it should be kept, and to take his inches in the tank and send them in; go over his reports and see if he was making them properly, making them up properly.

Q. Did you make sales of oil?

A. Yes, sir.

Q. Did you have any authority over the local agents?

A. No, sir; no authority whatever.

Q. You reported what you saw wrong?

A. I reported what I saw.

Q. To whom did you report; that is, what office?

A. I reported to the Nashville office, and also sent one of my reports to Cincinnati.

Q. Who was in charge of the Nashville office?

A. Mr. J. E. Comer.

Q. What was Mr. J. E. Comer's title; what was he known as, at that time?

A. He was known as special agent.

Q. Who was his predecessor; that is, who was in the office before Mr. Comer?

A. Mr. S. W. Coons.

Q. Did you serve under Mr. Coons?

A. Yes, sir; for a short while.

Q. Where did Mr. Comer live?

A. Nashville, Tennessee.

Q. During this time that you say you were a salesman, and particularly in 1903, where did you live?

A. I lived at No. 211 Fatherland Street, Nashville, Tenn.

Q. During the year 1903, were you accustomed, as traveling sales-

man of the company, to visit Gallatin, Tennessee, and see the trade there?

A. Yes, sir.

Q. What year did you begin to travel in that territory?

A. I think it was in the fall of 1902.

Q. About how often did you get around there?

A. About once a month.

Q. Were you acquainted with Mr. James Whitesides, of Gallatin?

A. Yes, sir.

Q. Who was he?

A. He was our agent over there at that time.

Q. Do you know who succeeded him?

A. Yes, sir; Mr. O'Donnell Rutherford.

316 Q. Who was your agent there in the years 1903 and 1904?

A. O'Donnell Rutherford.

Q. Name some of the customers, regular customers of the Standard Oil Company, that were customarily visited by you during this time, at Gallatin and in Sumner County?

A. Mr. S. W. Love, Mr. J. E. Cron, E. Franklin & Son, C. E. Powell & Co., Guy Fitzgerald, and William Lane.

Q. Did you have a customer by the name of Hunter? ..

A. Yes, sir.

Q. Where was he doing business?

A. Mr. Hunter, I believe, was at Bethpage, or Shackle Island, I don't remember which.

Q. He was not in Gallatin?

A. No, sir.

Q. He was at one or the other of those places?

A. Yes, sir, I think he was; he was out in the county there somewhere.

Q. Did you, during the year 1903, have any transactions with any of these merchants which you have named, in Sumner County, which resulted in you giving to them some oil?

A. Yes, sir.

Q. Now, when was that?

A. That was in October.

Q. Of what year?

A. 1903.

Q. Do you recall the time in October?

A. Well, I don't recall the date, but it was near the middle of the month, if I am not mistaken.

Q. At any rate, it was in October?

A. Yes, sir.

Q. And you think, near the middle of the month?

A. Yes, sir; it was near the middle of the month.

Q. How came you to go up there on that occasion?

A. I was at Monterey and Mr. Comer called me over the telephone and told me to go over to Gallatin.

Q. Called you by telephone from Monterey, Tenn.?

A. Yes, sir.

Q. And told you to go there?

A. Yes, sir.

Q. What did he say?

A. He says, I want you to go over to Gallatin; I learn that the Evansville oil people are doing considerable business; I want you to go over there and look after the trade; see what is the matter with Rutherford; how is it they come in and sell oil over Rutherford's head; find what they paid for the oil, and write and tell me about it.

317 Q. What did you do?

A. I came back from Monterey; I don't know whether I came back that day or the next day, but it was the last of the week when I came to Nashville, and I saw Mr. Comer here.

Q. What passed between you here?

A. He told me about the same thing; I don't know how he found it out, but he told me that the Evansville people had sold considerable oil over there, and he wanted me to go over and look after the business and countermand those orders if you can, he says.

Q. Countermand those orders if you can?

A. Yes, sir.

Q. Did you go?

A. Yes, sir.

Q. What was your position with Mr. Comer; was he your superior or not?

A. Yes, sir; he was my superior.

Q. Who fixed the price at which oil was to be sold?

A. Well, I don't know, sir.

Q. Did you have any authority about that?

A. No, sir; I didn't fix any prices.

Q. Did you get prices from any one; if so, from whom?

A. I got them from Mr. Comer.

Q. What was your authority with reference to prices; had you any authority to change them, or sell at different prices?

A. No, sir, I never had any authority to do that; whenever I came to a case of anything like that, I took it up with Mr. Comer, and if there was any change in prices to be done, he did it.

Q. You did not?

A. No, sir.

Q. Now, you had a conversation with Mr. Comer, and you were to go to Gallatin? Did you go?

A. Yes, sir.

Q. State what happened now, when you got there; who was the first merchant or person you saw on the subject of the Evansville oil coming in there?

A. I don't recollect who the first person was that told me about it when I reached the point, but the first merchant I called on was Mr. S. W. Love, and I went in to see him, and he knew, of course, I was with the Standard Oil Company, and I got to talking to him, and learned that the Evansville people were over there doing some business, and he said yes, he bought ten barrels of oil; and I asked him what was the matter, why we could not sell him; that we had been selling him; he had been a good customer of ours, and we had a local agent who, when he first went in there, seemed to deserve all

the trade there, because he needed all the help he could get.
318 and all the merchants promised to patronize him, and I told Mr. Love we wanted his business, and I told him I hated to see that oil come in there, for it looked bad for the agent over there, not being able to hold his trade; and Mr. Love told me he bought the oil, if I am not mistaken, a little bit cheaper, and it was put up to him as a better quality, the salesman having a lamp, showing how it burned. I asked Mr. Love if there was any way I could induce him not to take the oil; he said there was not; that he had ordered it and he guessed he would let it come. Well, I talked to him in that strain, about the agent and wanting his business, and I found I could not do anything with him, so I offered him a hundred gallons of oil if he would countermand the order, and he said, I will do it.

Q. Then what happened?

A. Then I wrote the telegram, he signed it, and I sent it.

Q. Who paid for it?

A. I did.

Q. The telegram was to whom?

A. Evansville Oil Company, Evansville, Ind.

Q. Do you recollect what it said?

A. Kindly, or please, countermand the order given your salesman, I believe, for ten barrels of oil.

Q. You say he signed it?

A. Yes, sir.

Q. Was that all that passed?

A. I said, "Now, Mr. Love, whenever you want this oil, tell Rutherford, and he will give it to you at any time you want it."

Q. Rutherford was the local agent, and had charge of the tank wagon?

A. Yes, sir.

Q. Was Rutherford with you at that time?

A. No, sir.

Q. After you got through with him, where did you go?

A. I went on up to see Mr. Cron. I was a little time getting up to Mr. Cron's; stopped on the street and talking to everybody I knew; and I don't know—possibly it was thirty or forty minutes before I got up to Cron's; then, when I saw him, I talked to him about along the same line, and it seemed that Mr. Cron had heard, during that time, that I had given Love this oil. I talked to Mr. Cron and he would not countermand the order at all, and then I offered him a hundred gallons.

Q. How many barrels had he ordered?

A. I don't remember whether it was five or ten barrels; I believe it was ten, but I do not recollect now; my memory is rusty on the amount of barrels Cron bought, so I offered Cron a hundred gallons of oil, telling him it was a hundred gallons clear profit.

319 Q. Did he accept it?

A. Yes, sir, and I wrote another telegram and he signed it, worded about the same as Love's.

Q. What did you do with that?

A. Walked down to the depot, and paid for it, and sent it.

Q. Before you went to anybody else?

A. Yes, sir.

Q. Then, what did you do?

A. After I left Cron's I went over to Billy Lane's and asked if he bought any oil from the Evansville people, and he said he had not, and I suppose I talked to Lane thirty or forty minutes—I don't know how long—talking to him about the trade and holding the business, and I called on the other merchants, called on every one of them, finding out what they bought, how much they bought and what they paid for it. Then, that evening—

Q. Wait a minute, before you get to that—was Mr. Rutherford with you to see any of these men?

A. No, sir.

Q. Did he have anything to do with that?

A. No, sir.

Q. Did he know you had gone to them for this purpose?

A. No, sir.

Q. Had you seen him?

A. No, he didn't know I was in town.

Q. But you did see Rutherford that evening?

A. Yes, sir.

Q. Now, state what happened?

A. I went up to my room, and he came up there with me, and I told him what I had done, and I told him I did that in order to hold the business; I had countermanded Love's order for ten barrels and Cron's order for whatever it was, and I said, whenever these merchants call for it, you give it to them, and I will pay for it, but I can not pay for it now.

Q. Wasn't something done about Lane before you got to that?

A. While he was talking, he said Billy Lane bought some oil, and I said he did; he told me he didn't, and he said he did. I will go over there, and if he bought any, he says, I will see if he will not countermand it, and I said, "All right; if he countermands it, you can give him fifty gallons."

Q. Do you remember how much he had bought?

A. I think it was five barrels.

Q. Did you go with him to see Lane?

A. No, he went by himself, and Billy would not countermand. He came back and told me, says, "Billy will not countermand his order;" and I said, "All right." I said, "Now, I don't want
320 the company to know about giving this oil away, and in taking your storage inches, if they measure forty, report forty-two, or forty-two and a half; report those inches above what is in their until I pay for the oil, and he told me, he says, "I feel like I ought to help you pay for it," and I says, "All right, it is as much your benefit as it is mine; more, because you are getting the commissions on the oil." I don't know how long we talked on there, for half an hour or an hour, and I made out my report, and he left.

Q. Now, did Lane, or not countermand his order?

A. I just don't know whether he did or not.

Q. You went to see another man, Mr. Hunter, did you not?

A. Yes, sir. Now, I said Lane didn't countermand his order. I don't recollect whether he did or not. He came back from Lane and said—yes, I believe Lane did countermand it. There were four countermanded their orders.

Q. Do you remember who they were?

A. There was Cron, Love, Hunter, and—yes, it was Lane; I believe it was Lane, but I just don't remember now whether Lane countermanded his order or not. There were four merchants, and I believe Lane was one of them, since thinking of it. I believe O'Donnell Rutherford did come back from Lane's with a telegram signed by Lane. There were four merchants, I know, Love, Cron, Hunter and another one; but I just don't remember. I haven't given it a thought, since, hardly, about who it was.

Q. Who went to see Hunter?

A. I did. He was in the country.

Q. Did Rutherford go with you?

A. No, sir.

Q. Now, you have stated the arrangements made as to Love and Cron, the way they should get their oil from Rutherford. What arrangement did you make with the other two?

A. Told them the same thing; that they could get it whenever they wanted it, or asked for it, and not to make out any ticket for it.

Q. What was the agreement between you and these merchants as to when the oil was to be delivered?

A. Wasn't any; whenever they wanted it, whenever they called for it.

Q. Was any particular oil to be delivered to them?

A. Oh, no; no particular oil.

Q. What I mean to ask you is whether that oil then at Gallatin, stored in the tank, was to be delivered, or any other oil?

A. No, sir; for we might have put new tank of oil in there the next day. We didn't know when oil was coming to Gallatin. He might have gotten a new tank in the next day, and he would have given that the same.

321 Q. You said Mr. Comer said go up there and countermand those orders if you could. What did he mean by that?

A. He meant, in the line of argument to use just like I have stated, to put it up to the merchants that we were there, as a part of Gallatin and Sumner County, and ought to have the business, being located there and employing an agent, one of their home boys, and we felt like we ought to have the business.

Q. Did he give you any instructions as to securing or effecting a countermand by gifts of oil, or anything like that?

A. No, sir; he did not.

Q. Were there any general orders or instructions or usages of the company that authorized that?

A. No, sir.

Q. Had you ever done such a thing before?

A. No, sir.

Q. Or since?

A. No, sir.

Q. Had you ever done anything like it before?

A. No, sir.

Q. How came you to do this on this occasion?

A. Well, sir, I just can't tell you how I did it. I wanted to get the business over there, and it was something I thought would put a feather in my cap by doing it, by countermanding the orders, and I didn't know what else to do, and I didn't see how I was to countermand the orders by talking, so I just gave them the oil. It is true, I could not afford to give them the oil, but I did it, nevertheless.

Q. What were the requirements of the company as to reports of you as a salesman, of what you did?

A. I was to make a complete report every day of pretty nearly everything I said.

Q. What was the nature of these reports, in duplicate, or triplicate, or how?

A. I made three copies—original, duplicate and triplicate.

Q. What did you do with them?

A. Kept one myself, mailed one to Nashville, and one to Cincinnati.

Q. Did you make a report of that character, of your transactions at Gallatin. Did you make a report?

A. I made a report of countermanding the oil, but didn't make any report of giving the oil away.

Q. You said nothing of that sort?

A. No, sir.

Q. To your knowledge, when was the first time that your superiors—and I mean by that, either the Cincinnati office, or the
322 Louisville office, or the Nashville office, or any other office—knew of these gifts of oil to secure the countermanding of those orders?

A. As near as I can recollect it, it was just before Christmas.

Q. Of that year?

A. Yes, sir. It was in December, and I am satisfied—I know it was before Christmas, for where we were boarding—I remember very distinctly it was just before Christmas.

Q. Where were you at the time you first heard that the company had knowledge of it?

A. I was at Dickson, Tenn.

Q. What were you doing down there?

A. I was down there looking after the trade, and selling all I could sell.

Q. How did you find out the company had knowledge of your gifts of oil at Gallatin?

A. Mr. Comer wrote me a short letter, saying he had learned I had given this oil away at Gallatin, and he wanted to know if it was a fact, and wanted a reply at once, but I didn't reply, but thought I would come in and tell him all about it.

Q. Did you come in?

A. Yes, sir.

Q. How long after that?

A. I think it was maybe a day or so. I know I didn't come in the day I got the letter.

Q. What happened between you and Mr. Comer?

A. Mr. Comer asked if I got his letter, and I told him I did, and he says, "Is it a fact that you did this?" and I said, "Yes, it is true;" and he said, "I wish you would certainly tell me what made you do it," and I sat down and told him every word of it, as I have told you, that passed between me and the merchants.

Q. What did he say?

A. He said, "Don't you know that was wrong?" I said yes, I knew it was wrong, but I said I didn't know at the time it was violating any law or anything like that. He says, "Now Holt, this is pretty bad. Now," he says, "I don't know what the company will do yet for this," he says. "I will write to Mr. Collings today, and," he says, "they may discharge you." "Well," I told him, I said, "I hope they won't, for I have been working for the company quite a long time, and I like the work, and, really, I don't know how to do anything else, much." He says, "Well, I will just put this matter up to Mr. Collings, and see what he says."

Q. Do you know his given name?

A. C. T. Collings.

Q. Where was he located?

A. He was then located at Cincinnati. Well, for two or
323 three days I was looking for my discharge, four or five days, until I got back in the office, I said to Mr. Comer, have you heard from Mr. Collings, and he said, yes, I have heard from him, but he says, I have not any definite answer for you yet. I was so sure of being discharged; my wife's people were living in St. Louis at the time, and her father wrote and told me to come right on up there then.

Q. But you were not, in point of fact, discharged?

A. Yes, sir.

Q. You remained with the company until when?

A. Until June 1st, of this year.

Q. Until *Just* 1st, 1907?

A. Yes, sir.

Q. Who was present, if any one, at the time of that conversation between you and Mr. Comer?

A. His stenographer, Miss Daisy Gunn.

Q. Where was the conversation?

A. In Mr. Comer's private office.

Q. You say you told Rutherford you would pay him?

A. Yes, sir.

Q. How much did the oil come to?

A. I paid him \$42.50.

Q. You say you paid him?

A. Yes, sir; I paid him \$42.50.

Q. When did you pay him?

A. I paid him in May, 1906, I believe. I didn't pay it for a long time afterwards; I didn't pay him until, I think, May. He wrote Mr. Comer a letter and told him he was hard up and needed some

money, and wanted to know about that money I owed him, and Mr. Comer wrote me a letter and told me, he says, if you have not paid O'Donnell Rutherford, as soon as you come to Nashville, I want you to go to Gallatin and pay him. So I came into Nashville on Saturday after I got his letter and went to Gallatin on the following Monday or Tuesday, and paid him.

Q. Where did you get the money?

A. I borrowed twenty-seven dollars from my wife. It was virtually mine, of course.

Q. You didn't get it from Mr. Comer?

A. No, sir; Mr. Comer would not lend me a penny; neither would the company.

Q. Now, if I understand you, Mr. Holt, you have stated that you, yourself, went to see merchants Love, Cron and Hunter?

A. Yes, sir.

Q. And that Mr. Rutherford had nothing to do with those visits at all?

A. No, sir.

324 Q. And didn't know of the first two? Did he know you went to see Hunter?

A. Not especially Hunter, but he knew I was going out in the country.

Q. But, as I understand you, it was he that went to Mr. Lane?

A. Yes, sir.

Q. And you are not clear whether Lane countermanded or not, but you do remember the number of merchants that countermanded?

A. Yes, sir; there were four; a hundred gallons apiece to two of them and fifty gallons apiece to the other two. I remember, in my statement at Gallatin, I gave the merchants' names.

Q. You speak of that statement at Gallatin. To what statement do you refer?

A. When I said who I gave the oil to.

Q. Do you mean that there was a case tried at Gallatin in which you were examined as a witness?

A. Yes, sir.

Q. A case against you and the company?

A. Yes, sir.

Q. Do you remember when that trial was had?

A. No, I don't recall those dates.

Q. At any rate, you were examined as a witness on that trial?

A. Yes, sir.

Q. What was the result of that trial, as far as you were concerned?

A. As far as I was concerned, I was fined three thousand dollars.

Q. That is the case you are talking about?

A. Yes, sir.

Q. And you testified in that case?

A. Yes, sir.

Q. Was your testimony taken down by a stenographer?

A. Yes, sir; I think so.

Q. Have you ever seen it since?

A. No, sir.

Q. What became of the case finally? What I want to get at is, was the judgment affirmed by the Supreme Court?

A. Yes, sir.

Q. And you were ordered to pay the three thousand dollars?

A. Yes, sir.

Q. It having been brought out by the Attorney General on cross-examination of Mr. Coons that the company had paid this fine for you, I ask you who did pay the fine for you?

A. Well, I could not swear to that.

325 Q. You didn't do it, did you?

A. No, sir.

Q. Who did you understand did it?

A. You did.

Q. As attorney for whom?

A. For the Standard Oil Company.

Q. But it has been paid, and you know it was paid, through John J. Vertrees, as you understand, as the attorney for the Standard Oil Company?

A. Yes, sir.

Q. Had Mr. Vertrees or any member of the company at any time prior to the conviction or affirmance of the judgment by the Supreme Court of Tennessee, in that case, made you any promise to pay it, or said anything whatever to you on the subject of paying it?

A. No, sir; I don't recollect that any of them ever did. You mean, from the time the case started until it ended?

A. Yes, until ended in the Supreme Court?

A. No, sir; none of them said they would pay it.

Q. Had Mr. Vertrees ever said anything to you on the question of the fine, prior to that?

A. No, sir; Mr. Vertrees never said anything to me like that. He always told me it would be thrown out of the courts. That is the reason I never felt uneasy about paying any fine.

Q. Now, after the judgment, what did he say to you on that subject?

A. After the judgment, I read it in the Banner and called you up, and you told me to drop by your office the next morning, and I dropped by your office the next morning and we went to the Supreme Court rooms, and you told me, as near as I can recollect, that you didn't know what the company would do about that. I said, what are they going to do with me? I said, you know I can not pay three thousand dollars; and I don't know whether the company will stand behind me or not, and you says, now I will tell you. I will put this matter up to those people, that if we can arrange these other three cases, and fix it so it will settle all in one, I may be able to get the company to pay your fine.

Q. What three cases do you refer to?

A. The other three cases.

Q. Back at Gallatin, pending unsettled?

A. Yes, sir.

Q. So, there were four cases in all?

A. Yes, sir.

Q. Well, go ahead?

326 A. That was the only time you ever said anything to me about paying that fine. Up to that time, until the decision was passed, you had always told me not to feel uneasy——

Q. That there was nothing in the case?

A. Yes, sir; that there was nothing in the case; so, I didn't feel uneasy.

Q. From the day of the decision, or that time you speak of, this conversation with Mr. Vertrees, how long was it before it was determined what would be done?

A. Well, I don't know exactly how long, but it seemed to me quite a little while. I don't know how many trips I made up to the Supreme Court.

Q. Do you mean Mr. Vertrees had told you, from time to time, to be at the Supreme Court on Saturdays?

A. Yes, sir; on Saturdays, or Wednesdays, or whenever they wanted to see me.

Q. Do you remember how many such trips you made?

A. Four or five or six.

Q. Did Mr. Vertrees inform you what was the trouble, or hitch; if so, state what he told you?

A. I believe I asked you one morning why we had to go so often, and you said the Attorney General was out, or that they could not get Mr. Peck.

Q. Who was Mr. Peck?

A. He is the Attorney General over at Sumner County; that they could not get them together.

Q. Now, after these intervals and various trips of yourself up there, what was the final interview up there; what happened?

A. The final interview was in the office, just before you go into the Supreme Court room. I was called out of the Supreme Court room by you and Mr. Cates; you all were standing there together.

Q. By Mr. Cates you mean the Attorney General of the State?

A. Yes, sir; and you told him I was the man that owed the money—the three thousand dollars—and didn't have any money and no way of raising any money, and I don't know exactly what passed between you and General Cates, but you, or Mr. Cates one, told me I could go.

Q. That the matter had been arranged?

A. Yes, sir.

Q. That the money was going to be paid, and you could go?

A. Yes, sir.

Q. And did you go?

A. Yes, sir.

Q. Weren't you introduced on that occasion by Mr. Vertrees to General Cates?

A. I believe so.

327 Q. Had you ever met him before that?

A. No, sir.

Q. You said that you paid Rutherford?

A. Yes, sir.

Q. Did the Standard Oil Company, or any of its representatives, promise or agree to refund to you that money you paid Rutherford?

A. No, sir; it did not.

Q. Has it ever done so?

A. No, sir; it has not.

Q. Who, according to the rules of the company, would be responsible for shortage in the oil in the tank at Gallatin?

A. The agent?

Q. What agent?

A. Rutherford.

Q. The local agent?

A. Yes, sir.

Q. Now, did Mr. Comer or any other agent or representative of the company authorize you to give away that oil?

A. No, sir; they did not.

Q. Was there any general rule, or orders, authorizing such a thing?

A. No, sir; there was not. I never heard of anything like it before.

Q. Did you ever do such a thing before?

A. No, sir; I did not.

Q. What was the first report or information that you gave to Mr. Comer, or anybody else connected with the company, of the fact that you had procured the countermanding of these orders by gifts of oil?

A. The first information, as I stated, was in Mr. Comer's office, after I came back from Dickson. I never did write him anything at all about it.

Q. Do you know how he got on to it first?

A. I think—but I am not positive about this—but I heard that Mr. Wilson told him, and then Mr. Rutherford came in and told him, too.

Q. Who was Mr. Wilson?

A. Mr. S. P. Wilson, who was at that time working in the office.

Q. Is Mr. O'Donnell Rutherford living or dead?

A. He is dead.

Q. Do you know when he died?

A. He died in August, I learned.

Q. Of what year?

A. This year.

328 Q. Do you know where he lived when he died?

A. No, sir; I don't know.

Cross-examination.

By Mr. CATES, Attorney General:

Q. Now, Mr. Holt, I believe you said you were indicted at Gallatin, along with the Standard Oil Company, about your transactions with Mr. Love, Mr. Hunter, Mr. Lane, and Mr. Cron. Is that correct?

A. Yes, sir.

Q. And you were tried in the Love case?

A. Yes, sir.

Q. And you gave testimony in the Love case?

A. Yes, sir.

Q. And that is the case that went to the Supreme Court and was affirmed?

A. Yes, sir.

Q. Now, who represented you in that litigation; who was your lawyer?

A. Well, I don't know whether I had a lawyer or not.

Q. Isn't it a fact that Mr. Blackmore and Mr. Vertrees appeared as counsel for you in that litigation?

A. I suppose they did.

Q. You never paid them anything for it?

A. No, sir.

Q. Now, you say you had no specific agreement beforehand, or during that litigation that the Standard Oil Company would pay your fine, but you felt sure, if you were fined, the Standard Oil Company would pay it?

A. I felt it that they would protect me to a certain extent. I had that feeling.

Q. Now, when the case was decided in the Supreme Court, you were not present that day?

A. No, sir.

Q. But you were notified by your counsel that you would have to be present later on?

A. Yes, sir.

Q. And before the judgment was entered?

A. Yes sir.

Q. You were on bond?

A. Yes, sir.

Q. Do you remember who was on your bond?

A. I think, Mr. Spillers.

329 Q. Who was he?

A. D. K. Spillers, of Gallatin.

Q. You had been a traveling salesman for the Standard Oil Company for something more than two years when these transactions occurred in October, 1903?

A. Yes, sir.

Q. Prior to the time you became traveling salesman you had charge of a local station for the oil company at Lebanon?

A. Yes, sir.

Q. So you had been in the service of the company for some four or five years?

A. Yes, sir.

Q. Now, was it among your general duties to have supervision of local agents and the manner in which they carried on their business?

A. It was my duties in this respect, where they were not carrying out their duties properly, to tell them and report it to Mr. Comer, and then he took the matter up with them, too.

Q. Mr. Comer was your immediate superior?

A. Yes, sir.

Q. From whom you took orders, and he gave orders to you?

A. Yes, sir.

Q. And controlled your movements and your actions?

A. Yes, sir.

Q. You had nothing to do with the Louisville office?

A. No, sir.

Q. Now, Mr. Holt, before Mr. Comer telephoned you at Monterey, or before you had any information from Mr. Comer that the traveling salesman of the Evansville Oil Company had invaded your territory in Sumner County, you knew of that fact?

A. I think I recall now I was told by some one that the Evansville oil people were in Gallatin, but I didn't pay much attention to it, because I heard so many things about competition around over the country.

Q. Didn't you hear it from a traveling salesman?

A. I believe it was a traveling salesman.

Q. Then you heard it from Mr. Comer?

A. Yes, sir.

Q. That was when Mr. Comer directed you to go to Gallatin and secure countermands of the orders?

A. Yes, sir.

Q. Those were the instructions you received from Mr. Comer?

A. Yes, sir.

Q. Of going to Gallatin and securing a countermand of those orders?

330 A. That wasn't the specific instructions; he told me to go to Gallatin, hold that trade, and if possible, of course, secure the countermand of those orders.

Q. You went under those general instructions?

A. Yes, sir.

Q. You discovered, when you got over there, that Roseman, for the Evansville Oil Company, had sold a considerable amount of oil in your territory?

A. Yes, sir.

Q. The Standard Oil Company had a local station there?

A. Yes, sir.

Q. Had two or three large storage tanks?

A. Yes, sir.

Q. How many?

A. Three.

Q. Kept considerable quantities of oil stored there, at all times?

A. Yes, sir.

Q. And with this oil that you were selling there in Gallatin from your local station, the oil which Roseman sold was coming in direct competition, wasn't it?

A. It was coming in direct competition with our oil at Gallatin.

Q. With your trade there?

A. Yes, sir.

Q. And with that oil you were selling there from those tanks?

A. Yes, sir.

Q. Now, you say you first went to Love, and being unable by moral suasion and argument to secure a countermand, you did trade with him?

A. Yes, sir.

Q. And for a consideration of one hundred gallons of oil secured his written countermand of that order?

A. Yes, sir.

Q. You prepared, signed and paid for the telegram countermanding the oil?

A. Yes, sir.

Q. And you did the same thing for Hunter and Cron?

A. Yes, sir.

Q. And Lane, if he was one of the four?

A. Yes, sir; I think he was one of them.

Q. Let me refresh your recollection about Lane. After he had told you, during the day, that he didn't buy any oil from Roseman, of the Evansville Oil Company, and you had your conference with Rutherford that night and Rutherford said he would go over there and see him, because he knew he had bought some——

A. Yes, sir.

331 Q. And first went over and could not secure the countermand, and you went over with him, you two together, and between you you induced him to countermand the order?

A. Well, I don't recollect whether I went, now or not; but if I stated that in the statement there, that is what I did.

Q. Now, on the other trial you were asked about that, weren't you?

A. I don't recollect whether I was or not.

Q. Weren't you asked about a written guarantee given Lane by Rutherford?

A. A written guarantee?

Q. Yes; that he would give the oil promised him?

A. Yes, Rutherford gave him that.

Q. It was present, and you identified it on the other trial when you were examined?

A. I suppose so; I don't recollect now.

Q. I read from the record in the case that went to the Supreme Court, and see if this refreshes your recollection, referring to the deal with Lane and after he had made a report to you: "You sent O'Donnell"—meaning O'Donnell Rutherford—"back to make the deal at once?"

A. Yes, sir.

Q. You entered into writing, didn't you?

A. No, sir; I did not.

Q. Rutherford did, didn't he?

A. I don't know whether he did or not.

Q. Enter into writing?

A. In that way.

Q. Agreeing to give Mr. Lane fifty gallons of oil to countermand that order?

"A. Mr. Rutherford did tell me that. I don't believe I read the copy of what he wrote.

"Q. Do you know the signature of Mr. Rutherford?

"A. Yes, sir; I think so.

"Q. You think you do?

"A. Yes, sir.

"Q. I will ask you if that is Mr. Rutherford's handwriting?

"A. I think it is.

"Q. Signed by Mr. Rutherford as agent of the Standard Oil Company?

"A. Yes, sir."

Then this was presented to you:

"October 1st, 1903.—This is to guarantee that I will give you fifty gallons of oil free, for the consideration that I cancel my order given to the Evansville Oil Company.

"O. D. RUTHERFORD,

"Agent Standard Oil Co."

332 Q. Is that the paper you identified?

A. I think it is; yes.

Q. Now, besides these four men, Love, Lane, Hunter and Cron, you went to see every other man to whom the Evansville agent had sold oil?

A. Yes, sir.

Q. You went so see a man by the name of Douglass?

A. Yes, sir.

Q. How much oil did you offer him?

A. I don't recollect; I believe it was fifty gallons.

Q. He didn't take it?

A. No, sir.

Q. You went up to see Louis Brentlinger, didn't you?

A. Yes, sir.

Q. How much oil had he bought from the Evansville man?

A. I don't recollect, now, how much he had bought.

Q. You offered him two hundred gallons, didn't you?

A. Oh, no; I don't think I did.

Q. Didn't you commence with a number of gallons lower than two hundred, and as he refused to revoke his order, you increased the number of gallons you offered, up to two hundred gallons?

A. No, sir; I never heard of that; I don't think I offered him two hundred gallons.

Q. How much do you think you did offer?

A. I would not have offered over fifty or a hundred gallons.

Q. There are two; now, who else, in addition to these two, did you visit?

A. I think, Guy Fitzgerald.

Q. Did he trade with you?

A. No, sir.

Q. Any one else?

A. I don't recall now.

Q. In other words, you were ready to offer every one of those

men who had purchased oil from the Evansville Oil Company, Standard Oil Company oil to secure revocations of their orders?

A. I will tell you the way I offered it to them. I told them I would rather give them fifty or a hundred gallons than to have seen them buy it, and if they talked as if they would take me up, I would. Now, I made that same proposition to Guy Fitzgerald, and he said: "I would not do anything *like* that," but I don't know I came out and told him I would give him fifty gallons or a hundred gallons. I said I would rather give him that than to see them buy it.

Q. You did tell Love and these others you revoked, that you would give it?

A. Yes, sir.

333 Q. And they traded with you?

A. Yes, sir.

Q. And in that way you were protecting your trade and the oil you had stored there at Gallatin, from the Evansville Oil Company oil?

A. Not necessarily the oil there in Gallatin at the time. It came in any old time; we didn't know when it was coming in Gallatin.

Q. It did protect the oil you had stored there?

A. Yes, sir.

Q. And it was done for that purpose, wasn't it?

A. Yes, sir.

Q. Now, you don't know how much oil you had stored there at that time?

A. No, sir.

Q. But you told Love and these parties they could have it at once, if they wanted it?

A. Whenever they wanted it.

Q. And you had enough there to furnish three hundred gallons?

A. Yes, sir; but they could not have taken it, I don't suppose, for their tanks might have been full.

Q. If they had demanded the oil that day, you would have furnished it to them?

A. We would have tried to get it to them. It was pretty late in the day, and I don't know whether we could have gotten it to them that day, and that would have depended upon whether the wagon was in the country that day.

Q. You had no doubt but what you had three hundred gallons in storage that day?

A. Yes, sir.

Q. And much more than that?

A. Yes, sir.

Q. Now, how long were you up there?

A. I think I was there the whole week. If I am not mistaken I was there the whole week.

Q. And you made a report of your doings every day?

A. Yes.

Q. In writing?

A. Yes, sir.

Q. About what time in the week did you come back to Nashville?

A. Well, I generally come in, sometimes on Friday, but I don't recollect whether Friday evening or Saturday.

Q. But you always came in on Saturday?

A. Always.

334 Q. When you came back from Gallatin to Nashville, you told Mr. Comer that you had secured the countermand of four of those orders?

A. I told him in the reports that I had made out.

Q. Didn't you tell him when you came in?

A. Yes, sir. I don't know whether it was Saturday, but I told him when I came in.

Q. Now, you told him that personally?

A. Yes, sir.

Q. But you say you didn't tell him how you had secured the countermands?

A. No; I didn't tell him I gave any oil away.

Q. Didn't he ever ask you how you secured the countermands?

A. He did.

Q. I mean, before the latter part of December, when the trouble arose?

A. Oh, no; when he asked me how I secured the countermands, when I returned from Gallatin, I mean, and I told him in the usual line of argument: if I am not mistaken that is what I told him.

Q. Didn't you testify, when you were examined at Gallatin, in the criminal case, that while you told him that you had secured the countermands, that you never did tell him how you did it?

A. I never did tell him how I did it.

Q. Did you at that time testify that you told him that you did it by argument?

A. Why, I don't recollect; I must have told him that, for I did not tell him I gave the oil away.

Q. Not what you must have told him; but do you recollect positively what you told him?

A. After I returned from Gallatin?

Q. Yes.

A. Well, I could not recall exactly what I did tell him, but I told him in my report just the same, that I had secured the countermand of those orders all right, and I told him I did it in the same line of argument, like he had told me to do—how to talk to them.

Q. I am not asking you what you said in your report, Mr. Holt. I want to know if it is not a fact, when you came back from Gallatin, you told him you had secured countermands of those orders?

A. I think so; yes, sir.

Q. And you don't know what else you did tell him besides that?

A. No, I don't know what else I told him besides that, because when we got together we generally talked about the general conditions all over the territory.

335 Q. Isn't it a fact, when you were asked during your examination in the trial at the Circuit Court at Gallatin, why you didn't tell him that, you answered like this?

"A. After I done that, I didn't think he would like it, and would object to it, and I didn't tell him, and I thought I could pay for the oil before he found it out and set it right; but it seems I didn't."

Wasn't that your reason?

A. That was my reason I didn't tell him; yes, that is the reason I didn't tell him.

Q. I will ask you if this wasn't asked you, in part of your testimony in the trial at Gallatin, where you were examined as a witness in your behalf:

"Q. Now, when you got back to Nashville on that Saturday evening, I believe you say you saw Mr. Comer, in a general way, and reviewed the work and discussed the matters of business?"

"A. Yes, sir."

Is that correct?

A. Yes, sir.

Q. Then, continuing:

"Q. Didn't he ask you anything about that Gallatin trip?"

"A. Oh, yes."

That is correct, is it?

A. Yes, sir.

"Q. Didn't you tell him anything about it?"

"A. I told him I had countermanded the orders for them barrels of oil."

Q. That is correct, is it?

A. Yes, sir.

"Q. You didn't tell him for three hundred gallons?"

"A. No, sir.

"Q. You told him you had countermanded the orders for oil?"

"A. I told him I had countermanded the order for oil from Mr. Love and Mr. Cron and Mr. Hunter and Mr. Lane."

That is correct?

A. Yes, sir.

Q. Then, continuing again:

"Q. Did he ask you what means you resorted to?"

"A. No, sir."

Q. Isn't that correct?

A. Yes, sir; that is correct.

Q. Now, Mr. Holt, you say you did expect to go around there or get around there, before the close of the month and square that up with O'Donnell Rutherford?

A. Yes, sir.

336 Q. You did mean to pay him, didn't you?

A. I sure did; yes, sir.

Q. How long did he stay in the employ of the company?

A. After that?

Q. Yes.

A. Well, now, I don't recall; he stayed until 1906, some time, I believe.

Q. Well, you and he were both examined on that trial?

A. Yes, sir.

Q. And that trial commenced along about September, 1904, didn't it?

A. Yes, sir.

Q. You were there as a witness?

A. Yes, sir.

Q. Rutherford was there as a witness?

A. Yes, sir.

Q. And Comer was there as a witness?

A. Yes, sir.

Q. And you all testified?

A. Yes, sir.

Q. Now, up to that time you had not paid Rutherford, had you?

A. No, sir; hadn't paid him.

Q. Are you sure he was still working for the company at that time? Do you think he was?

A. When we had the trial?

Q. Yes.

A. Yes, sir; I think he was.

Q. Still in the employ of the company?

A. Yes, sir.

Q. And you were?

A. Yes, sir.

Q. You didn't pay him, however, until he left the employ of the company?

A. No, sir.

Q. And went off for his health?

A. And went off for his health; yes, sir.

Q. And you paid for four telegrams, too, didn't you?

A. Yes, sir.

Q. Has that ever been repaid to you?

A. Yes, sir; I charged that up.

Q. You charged that up as expenses to the company?

A. Yes, sir.

Q. What did you charge that on?

A. On my expense report. I just said: to trade.

Q. Where is that report?

337 A. I don't know, sir. I put on every one of my reports, every day, to trade, when I spend any money—any little incidentals I might spend, just to trade.

Q. So you made a report every day?

A. Yes, sir.

Q. Sent one in every night?

A. Every night.

Q. And you didn't get around there before October 31, or rather November 1, when Rutherford had measured up his oil and report?

A. No, sir.

Q. You don't know whether the number as reported showed the shortage or not, do you?

A. No, sir; I don't know whether it did or not.

Q. You don't remember really when the first shortage did appear, did you?

A. No, sir; I do not.

Q. Now, before you were called into Mr. Comer's office, when you say you made the full explanation to him there, there had arisen considerable amount of talk up at Gallatin about those transactions, hadn't there?

A. I think so.

Q. And gotten in the newspapers?

A. Yes, sir.

Q. And Mr. Honeywell, one of the officers of the Evansville Oil Company, had been down here, complaining to Mr. Comer, had he not?

A. I think so, but I am not positive.

Q. If you don't know of your own knowledge, never mind.

A. I don't know, of my own knowledge.

Q. But you do know about the complaints?

A. Yes, sir.

Q. And the article in the newspapers?

A. Yes, sir.

Q. And it got in the newspapers here?

A. Yes, sir.

Q. And that very much agitated Mr. Comer?

A. Yes, sir; and me, too.

Q. They had begun to talk considerably about prosecuting the whole outfit for violating the interstate statute—I mean the anti-trust statute?

A. Yes, sir.

Q. Now, you were in Nashville the day before Christmas, 1903, weren't you, on December 24?

A. I think I was; yes, sir. It has been so long I do not recall exactly.

338 Q. You testified that before, that you were here then?

A. I think so.

Q. Now, you spoke something about a letter which Mr. Comer wrote to you, and which you say you received at Dickson. Where is that letter?

A. I haven't got it.

Q. Where is it?

A. I don't know, sir; I gave it back to Mr. Comer, I believe. I don't know whether he got my letter or took a copy of it.

Q. When you came in, didn't he ask for that letter and didn't you give it to him?

A. No, sir; I don't think he did, when I came in.

Q. You did give it back?

A. I think it was later on he asked for that letter.

Q. And you gave it to him?

A. I can't say whether I gave him that letter or not; it was a short letter. I don't remember whether I gave him that letter or not.

Q. Didn't you give it to him before the trial at Gallatin, when you thought you might need it?

A. I don't know whether I gave it or not. I know there was a

copy of the same letter at Gallatin, but whether that was my letter or not, I don't know.

Q. But what you did with the letter you don't know?

A. No, I do not. I might have given it back to him.

Q. The probabilities are that you did?

A. I cannot say that, for he had a copy of the letter right there.

Q. Right where?

A. In his office. He had a copy of my letter in his office.

Q. You mean the letter you received?

A. A copy of the letter you have reference to.

Q. The letter to you?

A. Yes, sir.

Q. But you didn't produce any such original letter at Gallatin when you were examined there?

A. I don't recollect. I didn't have that letter, and I don't recall now whether that was the original letter or not.

Q. Do you remember the date of that letter? Do you remember what you testified about the date of that letter?

A. No, sir; I do not.

Q. Don't you remember that you testified that the date of that letter was December 24?

A. Did I?

Q. I am asking you.

A. I don't recollect whether I did or not.

339 Q. That was after Rutherford had been down here?

A. Yes, I believe they did.

Q. After Honeywell had been down here?

A. Yes, sir; I believe so.

Q. And after the newspapers up at Gallatin had been denouncing the company and threatening prosecution for violating the anti-trust statute?

A. I don't know whether it was after that or not?

Q. Don't you know it was before December all that happened?

A. I don't know whether it was after the cases came out in the newspapers. I don't recollect that.

Q. After you had secured the countermand of these orders you were instructed to go and see Mr. Harris Brown, County Court Clerk at Gallatin?

A. Yes, sir.

Q. Mr. Coleman instructed you to do that, didn't he?

A. Yes, sir.

Q. And to see to it that the Evansville Oil Company, when its oil reached Gallatin and was refused by the persons who had given orders for it, paid a privilege tax before they sold it; that was your purpose?

A. To have them pay a license or privilege tax, or whatever it was, for storing their oil.

Q. Or whatever it was, for storing their oil?

A. Yes, sir.

Q. How often do local agents make reports?

A. Every day.

Q. You mean O'Donnell Rutherford made a report every day?

A. Yes, sir; that is, he made one report every day, and he only made one of his reports when he made a sale of oil.

Q. Didn't he also make reports on Wednesdays and Saturdays?

A. No, sir. He might have reported the number of inches in his tanks on Wednesdays and Saturdays, but that was on one of these reports he made up and sent in.

Q. Where were you living here in Nashville at that time?

A. I was living over on Fatherland Street.

Q. No. 211?

A. Yes, sir.

Q. Keeping house?

A. No, sir; I was boarding.

Q. With whom?

A. Mrs. Harry L. Anderson.

Q. There was a telephone in the house, wasn't there?

A. Yes, sir.

340 Q. And Mr. Comer had a telephone in his house?

A. Yes, sir.

Q. And when you got here, returning from your trip to Gallatin, you called him up over the telephone and told him about securing the countermand of the orders, didn't you?

A. I don't remember whether I did or not. I don't recollect whether I called him up over the telephone or not.

Q. And it was your custom to be in the office with Mr. Comer on Saturday?

A. Not a custom; no, sir. It was a day that I nearly always took myself to be at home. When I came in Friday night or Saturday at noon and went over to the office.

Q. Where you saw him?

A. Didn't see him every time I went there; and sometimes didn't go there at all.

Q. And he never did ask you how you secured the countermand of those orders?

A. No, sir.

Q. Did they increase your salary from that time?

A. No, sir.

Q. What were you getting then?

A. I believe I was getting sixty-five dollars—sixty or sixty-five dollars a month.

Q. So when you and Mr. Comer had your little interview and he said he would have to notify Mr. Collings, and you might be discharged, you say you were very apprehensive about what would be your fate?

A. Yes, sir; I was.

Q. And you were on tenter hooks for several days, until he heard from Mr. Collings?

A. Yes, sir.

Q. And he then told you Collings wasn't right sure about what ought to be done to you?

A. Yes, sir; that is what he told me.

Q. Mr. Collings is present, isn't he?

A. Yes, sir.

Q. Now, they kept you on tenter hooks something like four years?

A. No, sir; a short while after. He never said anything more to me about it, and I kept on working.

Q. And nothing more was said about it?

A. No, sir; kept on working.

Q. Kept on representing the company?

A. Yes, sir.

341 Q. And working for it?

A. Yes, sir.

Q. And you never were discharged?

A. No, sir.

Q. You left the employ of the company about June 1, 1907, voluntarily?

A. Yes, sir.

Q. And when you got into a lawsuit about this matter, you still were not discharged?

A. No, sir.

Q. And after all, they gave you a local agency down at Huntsville?

A. Yes, sir.

Q. About when?

A. That was in March I went to Huntsville—March or April of this year, 1907.

Q. Was Dover, in Stewart County, in your territory?

A. No, sir.

Q. In whose territory was that?

A. I have no idea.

Q. You don't know who the local agent was over there?

A. No, sir.

Q. Or who the traveling salesman was, occupying the same position you did?

A. No, sir.

Q. Now, it wasn't any personal gain to you, one way or the other, about who bought oil at Gallatin or did not buy, was it?

A. Well, I looked at that transaction in this light: I thought possibly if I held that business over there I might get a raise in my salary, or something like that.

Q. But you got no commission on sales?

A. No, sir.

Q. Neither of the oil in the tanks or oil in barrels?

A. No, sir.

Q. It wasn't your business, or your business was not affected by the Evansville Oil Company's sales, was it?

A. No, sir; only in the light that I was keeping up with my trade.

Q. Only in the light that it affected your employer's business?

A. Yes, sir; it affected their business.

Q. And the Evansville Oil Company coming in there might affect your employer's business?

A. Yes, sir.

Q. Do you know what oil was selling at then, in Gallatin?

A. No, sir; I don't recall the price.

342 Q. And these merchants out there told you, Love and others, that they got a superior grade of oil at cheaper prices?

A. Yes, sir; that is what they told me.

Q. And that was the reason they gave you for making these purchases from Roseman of the Evansville Oil Company? That was the reason they gave you?

A. Yes, sir; that was the reason they gave me.

Q. Now, who paid your salary; from what office was it paid?

A. I received my salary from the Nashville office.

Q. You had no communication with the Cincinnati office in respect to your salary?

A. None whatever.

Q. Who employed you for the company, the special agent or superintendent here in Nashville?

A. The special agent; yes, sir.

Q. That was Mr. Comer, Mr. J. E. Comer?

A. Yes, sir.

Q. He had general charge of this territory here?

A. Yes, sir.

Q. You say Guy Fitzgerald, when you approached him, told you he would not do a thing of that sort?

A. Yes, sir.

Q. He was a merchant selling oil over there at Gallatin?

A. Yes, sir.

Q. And you say at that time you didn't have any idea about the propriety of your action?

A. Any doubt about it?

Q. About the propriety of what you were doing or the lawfulness of it?

A. I had no idea there was any law in existence relating to what I did there.

Q. Wasn't any doubt created in your mind when Mr. Fitzgerald and these other merchants refused to have anything to do with that kind of business transaction?

A. There wasn't anything named then; I thought a man had a right to give anything away in the world that belonged to him.

Q. Just so you could protect your company's interests there, — what was in your mind, wasn't it?

A. Protecting their interest and mine, too.

Q. In your examination in the Circuit Court of Sumner County, when you were on trial, wasn't this question asked you:

"Q. But you all were looking after the interest of the Evansville Oil Company, in every way, were you not?

"A. Of the Standard Oil Company?"

Is that right?

A. Yes, sir.

343 Q. And you were looking after the interests of the Standard Oil Company?

A. Yes, sir.

Q. That is what you were doing?

A. Yes, sir.

Q. Did you spend Christmas of that year at home?

A. Yes, sir.

Q. Here in Nashville?

A. Yes, sir.

Q. Did you see Mr. Comer the day before?

A. The day before Christmas?

Q. Yes.

A. Why, really, I don't recollect whether I did or not. I don't know whether I saw him the day before Christmas or not.

Redirect-examination.

By Mr. VERTREES, for Defendants:

Q. Did the Evansville Oil Company have any station in your territory?

A. No, sir; they did not.

Q. Was Roseman a Tennessean?

A. I don't think he was.

Q. He was a traveling agent, wasn't he?

A. Yes, sir.

Q. Do you know where he lived?

A. Evansville, Indiana, he told me.

Q. Now, you have been asked about the letter. I will ask you if you did not exhibit in your deposition a copy of the letter about which you have been asked, on that trial in Gallatin, in September, 1904?

A. Yes, sir.

Q. Please exhibit a copy of the letter with your deposition as it appears in the transcript of the record in the case of the State vs. Standard Oil Company and others, from the Supreme Court of Tennessee, being the case from the Circuit Court of Sumner County, Tenn.?

The letter about which the witness has been heretofore speaking was here shown to him for identification, appearing on page 113 of said record, and identified the same.

A. Yes, sir; that is it.

Q. Read that letter?

A. It reads as follows:

344 "Nashville, Tenn., December 24, 1903.—Mr. C. E. Holt, Dickson, Tenn.—Dear Sir: Mr. Rutherford, our agent at Gallatin, was in the office yesterday evening, and tells me that you instructed him to deliver to three or four customers at Gallatin vicinity three hundred gallons of oil from his tank wagon, and make no charge for same, your object in doing this being to induce these merchants to countermand the oil which they had purchased from the Evansville Oil Company. He states that he made the delivery in accordance with your instructions. I wish you would write me if you did this; and if you instructed Mr. Rutherford to do anything like this, you certainly did wrong. It has never been our purpose to

resort to any such methods as these in order to turn the trade our way. You are aware that if the oil is delivered without record being made of the delivery, that the shortage is bound to show up in the agent's stock of oil at the end of the month, aside from the fact that the giving away of the oil, especially in such instances as Mr. Rutherford mentions, is entirely foreign to our general policy.

"Please write me fully by return mail, in reference to the transaction, and oblige,

Yours truly,

"(Signed)

J. E. COMER,

"*Special Agent.*"

Q. You have been asked about being local agent for the company at Huntsville. How long were you local agent there?

A. About two months.

Q. That is Huntsville, Ala., is it?

A. Yes, sir.

Q. Had you seen any publication with reference to this matter in any newspaper prior to your receiving that letter from Mr. Comer?

A. I don't recollect whether it was before or just after. It seems to me that all this came out at one time. I don't recollect whether I got this letter before I saw it in the newspaper, or *whether I got this letter before I saw it in the newspaper, or afterwards.*

Q. You have been asked if you felt that the company would protect you, and you answered that you did feel they would protect you to a certain extent. What did you mean by that?

A. I meant that the company would help me get out of the trouble.

Q. Had any representative of the company, directly or indirectly, promised or agreed to help you or pay your fine?

A. No, sir; they had not promised or agreed to help me in any shape, form or fashion.

Q. But you knew you had been with the company, and what you had done you had done for the company?

A. Yes, sir.

345 Q. Had Roseman or the Evansville Oil Company ever done any business in your district before this time?

A. No, sir; I don't think they had.

Q. This was their first appearance?

A. I believe this was the first time; yes, sir.

Q. You have been asked about going to Harris Brown. Who was Harris Brown?

A. He was the County Court Clerk, I think.

Q. You went to him for what purpose?

A. I went and asked if the Evansville Oil Company stored oil, if they would not be subject to this license; and if they did, we wanted to see that they paid it.

Q. You already had paid yours?

A. Yes, sir.

Q. And you wanted to see that your competitor did the same thing?

A. Yes, sir.

Q. Do you know how many barrels Roseman took orders for at Gallatin or in Sumner County?

A. It was sixty barrels he took orders for; sixty odd.

Q. How many did he ship in?

A. He shipped seventy or seventy-two. I could tell by referring to my reports I had when it was fresh in my memory.

Q. Are you able to say that he did ship in more than he had orders for?

A. Yes, sir; he did.

Q. I will ask you, to refresh your memory, if Roseman did not testify in that case against you, and if you were not present and heard him say that he did ship in ten barrels more than he had orders for?

A. Yes, sir; he did.

Q. Do you know when these merchants at Gallatin got this oil that was promised to them?

A. No, sir.

Q. At what dates?

A. No, sir.

Q. Whether they got it immediately, or sometimes afterwards.

A. I don't remember; he just delivered it to them when they called for it, whenever they needed it; he may have delivered it the next day.

Recross-examination.

By Mr. CATES, Attorney-General:

Q. When you went to see Mr. Harris Brown, the oil shipped by the Evansville Oil Company had not reached Gallatin?

346 A. I don't believe it had.

Q. Then you didn't know what amount would come?

A. I don't recollect now whether I found out whether he had sold all the oil or not; I don't recollect.

Q. But you went to see Mr. Brown before the oil arrived, and wanted him to be on the lookout for it?

A. I believe I did.

Q. So you didn't become apprised of the fact that more oil was shipped until some time after you had been to see Mr. Brown?

A. I don't recollect whether I knew of that fact or not.

Q. You didn't know how many orders Roseman had taken until he testified on the trial?

A. No, sir; I didn't know exactly, but pretty nearly how many.

Q. How long was it after you went to see Mr. Brown that the oil arrived in Gallatin?

A. I disremember.

Q. Did you ever go to the depot to see how much oil did come?

A. I didn't go especially to see; I went to the depot, and to the train there, and saw them unloading the oil.

By Mr. VERTREES, for Defendant:

Q. Do you know where this oil was to be shipped from?

A. From Oil City, Pennsylvania.

By Mr. CATES, Attorney-General:

Q. When examined before, you didn't make any statement in regard to Mr. Comer's statement to you that he would have to report the matter to Mr. Collings, and the probabilities were you would be discharged. You didn't say anything about that, did you?

A. No, sir; I don't believe I did; I didn't say anything about that, I don't think.

Q. Now, you have been asked about a copy of the letter which appears on page 113 of the Supreme Court Record, which is here before us, and you state that is a copy of the letter which you received at Dickson?

A. Yes, sir.

Q. Now, while it appears to be addressed to you at Dickson, do you recollect whether you actually received it there, or was forwarded to you?

A. No, sir; actually received it at Dickson.

Q. Now, if you were in Nashville the day before Christmas, how did you get this letter at Dickson?

A. I don't recollect whether I was in town the day before Christmas. But I think I was.

Q. Didn't you repeatedly testify during your examination in the Circuit Court of Sumner County, that you were in Nashville the day before Christmas?

A. Yes, sir; I think so.

347 Q. Now, you didn't during that examination, when you were asked to identify a copy of a letter then under date of December 24th, produce the envelope, did you, in which you received it?

A. No, sir.

Q. Or the original letter?

A. No, sir.

Q. You didn't have it then?

A. I don't recollect that I did.

Q. You had turned it over to Mr. Comer before that, hadn't you?

A. I don't know whether I turned that letter over to him or not.

Q. Didn't you know you were going to be asked about that letter?

A. About which, the letter?

Q. Yes.

A. No, sir.

Q. You didn't know that counsel for the Standard Oil Company was going to ask you about that letter, did you?

A. No, sir.

Q. You had never talked that over with Mr. Comer?

A. No, sir.

Q. But the fact is, you were asked about the letter by counsel for the Standard Oil Company?

A. I was on the stand, wasn't I?

Q. That is what I am talking about.

A. Yes, sir.

Q. You were examined on the witness stand about that letter, by counsel for the Standard Oil Company?

A. Yes, sir.

Q. And you didn't state at that time that that letter was missing; didn't you state that you expected that letter or the original of that letter was at your home in Nashville?

A. I don't remember what I stated about that now.

Q. Let me ask you if this does not appear in your examination on page 112 of the Supreme Court Record:

"Q. You received this original letter, did you?

"A. Yes, sir.

"Q. Read this letter to yourself, and see whether or not you can state whether it is a true copy?

"A. Yes, sir; this is a copy of the letter written to me while at Dickson."

Q. That is what you say, is it?

A. Yes, sir.

Q. Then, continuing:

"Q. Where would you say that the original letter is, that you received?

"A. I expect it is at my home in Nashville.

348 "Q. Is that a correct copy of it?

"A. That is a correct copy; yes, sir."

— Weren't those your answers?

A. Yes, sir.

Q. Was it at your home at Nashville at that time?

A. I expect it was.

Q. You went down there to Gallatin as a witness for yourself and also as the witness for the Standard Oil Company?

A. I suppose so.

Q. And you say nothing had been said to you before you left Nashville about bringing the original of that letter to the trial at Gallatin?

A. No, sir; I don't think anything had been said to me about that letter; if there had, I don't recall it now.

Q. And you say that Mr. Comer told you to go to Gallatin and hold your trade, and if necessary, secure the countermand of those orders?

A. Yes, sir.

Q. And you say you thought you were doing something very clever, and for which you would be duly rewarded?

A. I don't know whether I would be duly rewarded or not, but I thought maybe at some future time, you know, they might raise my salary or something like that, because I had held that trade over there for them, you know.

Q. They were appreciative of that fact that you held the trade?

A. They evidently were.

Q. And they recognized what you did to hold the trade?

A. Now, I suppose they did; I don't know whether that is a fact or not.

Q. You continued to hold the trade that way?

A. Not that way; not doing business that way.

Q. You didn't do that any more?

A. No, sir.

Q. You were asked by Mr. Vertrees if that was the first time Roseman had ever come into your territory with the Evansville Oil Company?

A. Yes, sir; it was.

Q. And it was the last time?

A. No, sir; he came in again at Springfield.

Q. He didn't come back to Gallatin?

A. I don't recollect whether he ever came back to Gallatin.

Q. And didn't ever bother you any more at Gallatin?

A. I don't believe he did.

Q. But at Springfield, it was afterwards, wasn't it?

A. Yes, sir.

349 Q. And the trouble had gotten up about this anti-trust statute, and you didn't give away any oil at Springfield?

A. No, sir; I didn't give any more away.

Q. Where are you living now?

A. I live in Indian Territory.

Q. Have you been in communication with the officers of the Standard Oil Company in relation to your deposition?

A. Yes, sir.

Q. Of course they furnished you transportation to come here and testify?

A. They said they would; they have not done it yet.

Q. Now, when you went to Oklahoma or Indian Territory to live, they gave you a recommendation?

A. No, sir.

Q. You are not working in connection with any of their officials out there?

A. No, sir; I never asked them for any recommendation.

By Mr. VERTREES, for Defendant:

Q. What are you doing in Indian Territory?

A. I am working with my father-in-law in the general merchandise business.

Further this deponent saith not.

C. E. HOLT,

By Stenographer and Notary Public.

Filed October 28, 1907.

(Trans., Vol. 2, p. 342.)

C. T. COLLINGS, the next witness called, and being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. Please state your name and your age?

A. My name is Crittenden Taylor Collings; age 58 years.

Q. Where do you live?

A. I live in Cincinnati, Ohio.

Q. What connection, if any, have you with the defendant, Standard Oil Company?

A. I am the second vice-president of the Standard Oil Company, a company incorporated under the laws of Kentucky.

Q. How long have you been second vice-president?

A. About eight years.

Q. How long have you been connected with the company?

A. Twenty-one years.

350 Q. As second vice-president of the company, what duties do you actively discharge?

A. The general management of the company's affairs.

Q. So, while your office is that of second vice-president, practically, you are the general manager of the company's affairs?

A. Yes, sir.

Q. And how long have you been general manager?

A. The same length of time I have been second vice-president.

Q. Eight years?

A. Yes, sir.

Q. During that time, where have your headquarters been?

A. Part of the time at Cincinnati, and part of the time at Covington.

Q. Where are the general offices of the company now?

A. At Covington.

Q. How long have they been at Covington?

A. I think it was in April, 1906, we moved to Covington.

Q. When did you move from Cincinnati to Covington?

A. In April, 1906.

Q. Now, when you made that move, did you move into temporary headquarters or your permanent headquarters?

A. No, sir; we had to take temporary headquarters, very limited space, until we could build an office, and we purchased a building and reconstructed it, and moved again in the fall of 1906.

Q. So you moved twice?

A. Yes, sir; in the year 1906, to Covington.

Q. I am asking you this especially as to an inquiry as to your papers. State what you did with them?

A. When we moved out of Cincinnati, we had to go over all our old books, papers and files of every description, and we could only take a very limited quantity, because we did not have the storage space, and those things we thought that we would need the most, the recent books and papers, we kept; and the older books and papers, of every description, we destroyed.

Q. About what quantity?

A. I think we had about ten rooms in the office in Cincinnati; I think there were ten fireproof storage rooms in which we had old papers and books stored; I could not tell you how much.

Q. Several tons?

A. Oh, more than that.

Q. And they were destroyed?

A. Yes, sir; had to destroy them; no place to store them; and they were an accumulation of twenty years.

Q. It has been explained by Mr. Coons in a deposition he gave, that the business was divided up into districts?

A. Yes, sir.

351 Q. In charge of what are called special agents?

A. Yes, sir.

Q. Now, what territory is under your charge as general manager?

A. The business in Kentucky, Tennessee, Mississippi, Louisiana, Alabama, Georgia and Florida.

Q. Now, is this territory divided up into special agencies?

A. Yes, sir; I think we have seven special agencies, and those agencies control or supervise the business of certain sub-stations.

Q. They are the local agencies, are they?

A. Yes, sir.

Q. Now, how many special agencies have you in Tennessee; any here?

A. Yes, sir; one at Memphis.

Q. Was Nashville ever a special agency?

A. Yes, sir; it was, I think, until the first of January, last; I am not sure whether it was the first of January, last; yes, it must have been the first of January, last.

Q. Then what happened?

A. After the death of Mr. Comer, we decided to put it under the management of Mr. Coons; he had formerly been special agent at Nashville, and was thoroughly familiar with this agency, and we turned it over to him.

Q. Louisville is a special agency?

A. Yes, sir.

Q. And Nashville is a sub-agency?

A. Yes, sir.

Q. What was done with the books of the special agency that had been at Nashville?

A. They were gone over, and what was deemed most important were taken to Louisville, because they would require it for reference, and some of them were sent to Covington, and the remainder were destroyed.

Q. Who had been the agents at Nashville during the time it was a special agency, during your administration?

A. During my administration, Coons and Comer.

Q. Is Mr. Comer living or dead?

A. He is dead; he died some time in 1906.

Q. Who is the agent of the company here now?

A. Mr. S. P. Wilson.

Q. But it is a local agency merely?

A. Yes, sir.

Q. Now, during the year 1903, how were the prices at which the company would sell oil, and did sell oil in Tennessee territory, fixed and determined?

352 A. They were controlled by the prices at primary points, at the refineries; the primary points.

Q. But, so far as Tennessee was concerned, particularly at Nashville, were they authorized to make or fix prices?

A. They were not.

Q. What was their authority with reference to prices?

A. If they had any reason to feel our markets were too high, or too low at any particular point, it was proper for them to make a recommendation, which I, of course, considered.

Q. A recommendation to you?

A. Yes, sir; to me.

Q. What power or authority had sub-agents or local agents over the control of prices?

A. None whatever.

Q. Then, if I understand you, in your territory, the prices at which oil, from time to time, should be sold, was fixed by you, as far as they were concerned?

A. Yes, sir.

Q. Upon the considerations you have heretofore mentioned?

A. Yes, sir.

Q. And to whom would you communicate that, special agents or sub-agents?

A. Special agents; I had no communication with the sub-agents.

Q. On the question of price?

A. In fact, on any matter; I do not direct them in anything.

Q. Wholly directed through the special agents?

A. Yes, sir.

Q. What is the usage or custom of trade, if there is any such usage or custom of trade, especially throughout the territory in the State of Tennessee, and elsewhere, in regard to countermanding orders?

A. There is no such rule or usage; we do not permit our people to secure countermand of orders.

Q. I mean in this, that the trade and merchants send you in orders?

A. I beg your pardon. My understanding is that a merchant has a right at any time before the goods are shipped to have them countermanded.

Q. Was that the privilege or usage in 1903?

A. It unquestionably did exist.

Q. Does it now?

A. It does.

Q. Are those usages practiced on you?

A. They are.

Q. And were they?

A. Yes, sir.

353 Q. How long has that been a course of business?

A. It has always been, unless a man has a signed contract by which he binds himself not to countermand the order. He would have the same right to countermand it, by the same right which he gave it, if the shipper or receiver of the order has not incurred any expense.

Q. At any rate, that is the usage of the trade?

A. Yes, sir.

Q. And has been, through all these years?

A. Yes, sir.

Q. And prior to 1903?

A. Yes, sir.

Q. Now, you, misunderstanding me, said there was no custom or usage as to the giving away of oil. I wish now to come to that question, as to the usage or custom of the company, within your district, under your supervision, and that territory, and particularly in Tennessee, and more particularly in Sumner County and at Gallatin, whether the company had any usage or custom of securing the countermanding of orders by the gift of oil or other valuable considerations?

A. I have never heard of such a thing, and never permitted it, and I never knew of an attempt of that kind being made by an employé of the company until this Gallatin case came up.

Q. Now, what was your first knowledge of this Gallatin case?

A. I think I saw it in a Tennessee paper, about the last of December, a clipping in a paper.

Q. What paper was that?

A. I think it was the Memphis Appeal.

Q. Commercial Appeal?

A. I think so; I don't remember.

Q. What did you do about that?

A. I wrote to Mr. Comer and said, what is there in this statement, and is there any truth in it?

Q. Do you remember the date you wrote that?

A. I think it was December 28th or 29th, 1903.

Q. Have you any way of fixing the exact date?

A. I have.

Q. See what it was?

A. I have a copy of the letter I wrote Mr. Comer, or I think I have it. Yes, here it is; it was December 26th.

Q. State what is this paper that you refer to?

A. This is a tissue copy of the original letter.

Q. You mean a letter-press copy?

A. Yes, sir; I think it is out of my letter book.

Q. Read it?

A. It reads as follows:

"DECEMBER 26, 1903.

("Clipping from Memphis Paper.)

"Mr. J. E. Comer, S. A., Nashville, Tenn.

"DEAR SIR: I herewith hand you a clipping from the *Commercial Appeal*, of Memphis, Dec. 24, in regard to the S. O. Co. being indicted for giving away oil at Gallatin, Tenn. Have you seen this, and what grounds are there for the statements?

"Yours truly,

C. T. COLLINGS.

"E."

Q. Where was that letter written?

A. I think it was written at Cincinnati.

Q. To whom was the original sent?

A. To Mr. Comer.

Q. Was it sent?

A. Oh, yes; undoubtedly.

Q. At that time?

A. Yes, sir.

Q. And you say that was your first intimation, gotten in that way?

A. Yes, sir; that was the first I heard of it.

Q. And that letter is dated December 26?

A. Yes, sir.

Q. And states that you got it from the *Commercial Appeal*, of Memphis, dated December 24?

A. Yes, sir.

Q. Did you receive any reply from Mr. Comer in response to that?

A. I received a letter from Mr. Comer, of the same date as mine; they crossed in the mails.

Q. Have you that original letter?

A. I have not the original letter, but I have a tissue copy.

Q. Have you hunted for the original?

A. I have, and have been unable to find it.

Q. You say you have a tissue copy; where did you get that?

A. I got it from Nashville, I think among the old papers when the old papers were sent to Louisville; some of the old impression books, and I had Mr. Coons or some one look for this, and they found a letter book containing this impression and cut it out and sent it to me.

Q. What is the date of his reply?

A. It is not a reply to my letter. It is dated December 26.

Q. It is not a reply?

A. No, sir; because it is dated the same day.

Q. Does it purport to be a reply?

355 A. No, sir; it is dated December 30, 1903, addressed to me at Cincinnati, and the subject is "Giving away oil."

Q. Please read that letter to the stenographer, and also exhibit this copy, which you say is a tissue impression out of the letter book,

as a part of your deposition, marking it Exhibit No. 2 to your deposition, there being two pages of that letter.

A. I will do so. The letter reads as follows:

("Personal.")

"DECEMBER 26, 1903.

"Giving Away Oil.

"Mr. C. T. Collings, V. P., Cincinnati, Ohio.

"DEAR SIR: Referring to above subject: It has just developed that Mr. C. E. Holt, Refined Oil Salesman, and our Gallatin agent, gave away to customers in and near Gallatin, 300 gallons of tank wagon oil, in order to induce them to countermand oil which they had ordered from the Evansville Oil Company. This oil was given away and delivered on November 6. When the agent sent in his monthly inventory for November to this office, a shortage in stocks were shown at Gallatin. In correspondence with this office the fact was not brought out that a transaction of this kind had occurred, but as it is customary for us to hold up agents' drayage check until a shortage of this kind is settled, the Gallatin agent came to Nashville day before yesterday evening, and in talking to him about the matter, he stated that he had given away 300 gallons of oil by direction from Mr. Holt, who was in Gallatin when the oil was delivered. As soon as we received this information we charged the shortage at Gallatin to the agent, and deducted same from his drayage check. I also wrote a letter to Mr. Holt, asking for explanation of this matter, and asked the agent if he had ever been instructed by the company to do anything like this, and he stated that he had not, and that the reason he did not take the matter up with us before delivering the oil was that he was of the opinion that Mr. Holt knew what he was doing.

"Mr. Holt came into the office this morning and stated that they gave away 300 gallons of oil, which was divided between four merchants, explaining that it was understood between he and the agent that they would give the oil away and pay for it themselves, and that they had it understood with the merchants the Standard Oil Company was not giving them this oil. This may have been the intention of Mr. Holt and the agent, but the merchants who received the oil, no doubt, are of the opinion that the Standard Oil Company gave them the oil in order to induce them to countermand orders

356 which they had given to the Evansville Oil Company. A very ugly feature in connection with this matter is that the matter has been taken up by the Evansville Oil Company, and a publication appeared on the 23d in a weekly newspaper at Gallatin, to the effect that the matter would be taken into the courts and we would perhaps be indicted by the next grand jury at Gallatin. The manager of the Evansville Oil Company, Mr. Honeywell, was at Gallatin a few days ago, and no doubt is responsible for this publication. As soon as I received the facts in this case, I called on Col. Vertrees, and asked him if there was anything in the transaction for which we could be indicted or brought into court. He stated that, in view of

the fact that we had not authorized the oil to be given away, and further, that as soon as we received the facts in the case, that we deducted the amount of this oil from the agent's drayage bill, refusing to pay him for it, that even if there was any violation of law in giving away oil in this manner, that our action in not recognizing the transaction would clear us of the violation of any Tennessee law. Col. Vertrees asked me to write the facts out just as I had stated them to him, and that he felt quite sure we would not be held for any violation of the law. As I did not know what action might be taken by the Gallatin authorities, I thought it best to consult Col. Vertrees at once. As the holidays are on now, it is hardly probable, even if anything is going to be done, that it will be done for several days.

"I wish you would write me by return mail, however, advising us just what to do under the circumstances, and if you approve of what we have already done.

"Mr. Holt certainly knew better than to authorize the agent to give away this oil. He knew that, aside from the fact that this office should have been notified before he took any such action, and also that this shortage would show up in the agent's inventory at the end of the month, that the giving away of oil in this manner was entirely foreign to anything that we had ever done in the past. This is the ugliest case that I remember ever coming up since my connection with the Standard Oil Company, and I can not tell you how much I regret it. If you do not approve of my taking the matter to Col. Vertrees and of his handling it as outlined above, wire me Monday morning and I will have him hold it up until we get a letter from you.

"Yours truly,

J. E. COMER,
"Special Agent."

Q. When did you get this copy?

A. I can not recall.

Q. But it was found among the papers sent up from the Nashville office?

A. Yes, sir.

Q. Was this sheet in a book?

357 A. I think it was just cut out of the letter book. It was some while ago when I got it from Louisville.

Q. Did you reply to that letter, Mr. Collings?

A. I did, and I have a tissue copy of it.

Q. When did you reply?

A. December 28th.

Q. Where is the original of that letter?

A. I sent it to Mr. Comer, and, of course, they could not find it, in moving around and changing things.

Q. Is that a true copy?

A. Yes, sir.

Q. Typewritten, taken at the same time the original was written?

A. No, I think that is a tissue copy.

Q. Read that letter?

A. It reads as follows:

"DECEMBER 28, 1903.

"Trouble at Gallatin."

"Mr. J. E. Comer, S. A., Nashville, Tennessee.

"DEAR SIR: I am in receipt of your letter of the 26th instant, on the subject of giving away oil. I sent you Saturday a clipping from one of the Memphis newspapers about this Gallatin business. It is very unfortunate that our people will assume the authority of doing things like this and getting us into troubles of this kind. If I did not know that Mr. Holt acted in the matter with the best intentions in the world, I would insist on discharging him. Under the circumstances, I see nothing for you to do but to insist on these gentlemen paying for the 300 gallons of oil. You may charge it to them at a nominal price, but the one point must be brought out, just as Judge Vertrees suggests, viz.: that the action on their part was wholly unauthorized, and we unhesitatingly condemn the action of our employes in this matter. Of course, if an employe of ours chooses to buy oil from the company and give it away, these people must see that we can not prevent it, or know about their action until the thing is all over.

"I fully approve of your consulting with Judge Vertrees, and if anything further comes of the matter would suggest you handle the case just as Judge Vertrees may advise you to do. My opinion is, however, that the matter will blow over. Please keep me advised about the matter, and whether or not anything further is done.

"Yours truly,

C. T. COLLINGS."

358 Q. In this letter you say to Mr. Comer that he may charge the two young men for the oil, but at a nominal price. Please state what that means?

A. That is a term we use, when any employe desires to buy oil, which is quite common. Nearly all of them buy oil and gasoline from the company, and a nominal price is about cost.

Q. Do you sell to all employes at a nominal or practical cost price?

A. Yes, sir.

Q. Mr. Comer's letter speaks there about it being taken out of Rutherford's drayage. What does that mean?

A. It is called commission, or drayage; the terms are used in common. It was, at a station like Gallatin, we allow an agent a commission, and his receipts are dependent upon the amount of oil he delivers. If I remember rightly, at Gallatin, the commissions were one-half cent on the oil delivered from the tank wagon, in the town proper, being convenient to it to deliver; in the country we gave him a cent and a half for drayage, or commission, on the oil he delivered out in the country, and often it required four mules to take the oil out to Bethpage, for instance, and, naturally, he was entitled to a greater compensation.

Q. What about barreled oil?

A. He delivered a certain amount of barreled oil, as there was a set of jobbers that bought in five and ten-barrel lots, and he delivered that at fifty cents a barrel.

Q. Did you pay him any fixed salary?

A. No, sir.

Q. His compensation was made up entirely of these drayages or commissions?

A. Yes, sir. And at the end of the month it was one of the duties of the sub-agents to send in a statement of the total refined oil or gasoline delivered in the country, at a cent and a half a gallon, or, in other words, to make out his bill for drayage, and then, generally, he got a check by return mail to cover that, if there was no deduction. In case the sub-agent is short in his stock, and can not account for it, we generally hold up that check until he has explained that shortage or made good for it, if it is proven they are responsible, as they sometimes are careless, or their subordinates they may have some one to do the rough work, and he may go out and deliver a barrel of oil that he does not charge, or make a check for; therefore, in checking him up that way, we find him short.

Q. Did you receive knowledge or information of this matter from any other source than the newspaper, the *Commercial Appeal*, and Mr. Comer?

A. Right shortly after Mr. Comer wrote—after I received 359 that letter you had there from Mr. Comer—some one from our office had come through Nashville and stopped there on other business, and reported to me that Mr. Comer was very much worked up and in a very much agitated state of mind over this transaction.

Q. But that representative was coming from Mr. Comer?

A. Yes, sir.

Q. But did you get any information from outside sources?

A. I can not recall that now.

Q. This, though, was the first, as I understand you?

A. Yes, sir, that was the first—that clipping from the paper was the first—and what I heard of the transaction first, and I immediately asked Mr. Comer to explain what it meant, and before he received my letter he had written.

Q. Was there any person or any official controlling the affairs and business of the company in Tennessee, other than yourself?

A. No, sir.

Q. Was there any person in Middle Tennessee, other than Mr. Comer, your subordinate as special agent?

A. There was not.

Q. Did Mr. Comer have authority to give away the oil of the company to secure the countermanding of orders?

A. He did not.

Q. Did Rutherford, or Holt, or any subordinate?

A. No, sir.

Q. Had any of the agents of the company?

A. No, sir; they had not.

Q. Had anything of the kind been done previously?

A. Not that I ever heard of.

Q. Counsel were employed and the cases were fought at Gallatin?

A. Yes, sir.

Q. And with the final result, as you have heard stated here?

A. Yes, sir.

Q. Now, it resulted, did it not, in a fine of three thousand dollars and costs imposed in that case known as the Love case, in the Supreme Court, on Mr. Holt?

A. Yes, sir.

Q. But the company was discharged?

A. Yes, sir.

Q. By whom was that fine paid?

A. It was paid by the Standard Oil Company. I think I paid you the money.

Q. Sent the check to John J. Vertrees, attorney?

A. Yes, sir; I sent a check to you for the money, and you sent me a receipt.

360 Q. Was the company under any obligation of a legal character, or promise, of any kind, to pay that?

A. It was certainly under no promise, and I don't think it was under any legal obligation to pay it.

Q. With whom did the suggestion originate that it should be paid?

A. You advised that it should be paid, I think.

Q. Was it coupled with any condition?

A. Not that I recollect.

Q. To refresh your memory, wasn't it coupled with the condition that while it was, under the circumstances, and in view of Mr. Holt's situation, a thing you ought to do, yet the question whether you would do it or not ought to depend on the question of the agreement you could make with the authorities about the other cases at Gallatin?

A. I believe I had an interview with you on that subject, and I submitted that to our regular counsel at Cincinnati, and they concurred in your judgment.

Q. Isn't it true that at that time there were three other cases pending at Gallatin?

A. Yes, sir; that was one of the things, and that these three cases could be disposed of if this settlement was effected.

Q. Was it, or not, finally reported to you by Mr. Vertrees that a settlement had been effected?

A. Yes, sir; and along those lines.

Q. And you sent him the money?

A. Yes, sir.

Cross-examination.

By Mr. CATES, Attorney General:

Q. I believe you said you lived in Cincinnati now?

A. Yes, sir.

Q. And have been connected with the Standard Oil Company something like twenty years?

A. Twenty-one years.

Q. When was the Standard Oil Company of Kentucky organized?

A. In 1892, I believe. Prior to that it was the Chess-Carley Company, which was the predecessor of the Standard Oil Company.

That was a company incorporated under the laws of Kentucky. No, it was in 1886. The Standard Oil Company of Kentucky was organized in 1886.

Q. A Kentucky corporation?

A. Yes, sir. The Chess-Carley Company was the predecessor of the Standard Oil Company, and they went out of business in 1886, and the Standard Oil Company succeeded them.

Q. Were you one of the incorporators of the Standard Oil Company?

A. Of Kentucky, no, sir.

Q. This Chess-Carley Company was a concern owned by the Standard Oil Company of Ohio?

A. No, I don't think it was.

Q. The same people interested?

A. I think Mr. F. D. Carley was a large stockholder in it. I don't know just who owned the control of it. I know Carley, individually, was a stockholder in it.

Q. Where is the home office of the Standard Oil Company of Kentucky now?

A. In Covington.

Q. In the State of Kentucky?

A. Yes, sir.

Q. Recently moved there from Cincinnati?

A. Yes, sir; in April, 1906.

Q. And you have been with it since its organization?

A. Yes, sir; twenty-one years—twenty-two years, for I was with the Chess-Carley Company one year.

Q. Who is the President of the Standard Oil Company of Kentucky?

A. Mr. C. M. Pratt.

Q. Where does he live?

A. He lives in New York, or Brooklyn.

Q. Has the Standard Oil Company of Kentucky a New York office?

A. It has.

Q. Whereabouts?

A. 26 Broadway.

Q. That is also the office of the Standard Oil Company of New Jersey?

A. I think it is, though I have no dealings with that company.

Q. Don't you report to some one in New York?

A. I report to the President and Vice-President of the company, at their office.

Q. Who is the vice-president?

A. H. G. Westcott.

Q. Don't you know that the Standard Oil Company of Kentucky is owned by the Standard Oil Company of New Jersey?

A. It is largely.

Q. Under the same control and management?

362 A. It is owned largely by the Standard Oil Company of New Jersey, but, as to its management, I don't know, outside of my own company, and I don't go outside of my own company on questions of that kind.

Q. You, in this territory down here, are the chief executive of the company?

A. Yes, sir.

Q. Obeying orders from Pratt or Westcott in New York?

A. Yes, sir, and the board of directors; we have a board of directors, of course.

Q. Who constitute the board of directors of the Standard Oil Company of Kentucky?

A. I could not name them all.

Q. Are you one?

A. Yes, sir.

Q. Mr. Pratt another?

A. Yes, sir; and Mr. Westcott.

Q. Mr. Tilford?

A. W. H. Tilford is a director, yes, sir.

Q. Mr. Comer represented the defendant, Standard Oil Company, in Tennessee in 1903?

A. Yes, sir; he did.

Q. And had the power of selecting salesmen and agents in this territory?

A. He had the power to recommend them, but could not name them.

Q. Who named Holt?

A. He recommended Holt and I approved it. He sends in his recommendations to me and the general manager, and he brings it to me and we discuss it and decide it.

Q. I thought you were the general manager?

A. No, I am the second vice-president. I said the general management—I mean, I had the general direction.

Q. Who is the general manager?

A. C. H. Hand.

Q. Where is he now?

A. He is at Covington.

Q. Now, you say what time in 1906 was it you moved the office across from Cincinnati to Covington?

A. I think it was April 1st. It might have been a month prior or a month later, but it was right along there.

Q. At that time the case pending against the Standard Oil Company of Kentucky and C. E. Holt, in the Supreme Court of Tennessee, was undetermined—had not been yet decided?

A. I don't remember. When was that case finally decided?

363 Q. Don't you recollect it was last spring your counsel took up the matter of the fine with you?

A. I might, by thinking about it a little, but you asked me off-hand when the case was decided, and I could not tell you.

Q. Now, you didn't burn all the papers of the company, did you?

A. No, sir.

Q. You don't know what papers you did burn?

A. No papers running back twenty years; there was an accumulation of probably twenty years there.

Q. The papers of importance, and that might be material to the current business of the company were retained?

A. Of course, we endeavored to retain those that we thought would be material.

Q. And other important papers?

A. Yes, sir.

Q. Now, when was it you discontinued the Nashville office?

A. I think it was the first of January, last.

Q. First of January, 1907?

A. Yes, sir; I think it was.

Q. Did you take all of the papers pertaining to the Nashville office away from Nashville?

A. I think we took all that was of any interest to Louisville; that is, that they would need in the general handling of affairs in Tennessee, they were sent to Louisville, for the reason that they might need any of the current information; and those which were of a general character that would not be needed by the Louisville office, and were of no value, or supposed to be of no value, we destroyed.

Q. But those that were of value or importance were retained?

A. I think so.

Q. Where were they taken?

A. Some of them were taken to Covington, and some were taken to Louisville.

Q. Now, you presented here what you say is a letter press copy of a letter from you to Mr. Comer, under date of December 26th?

A. Yes, sir; December 26th, 1903.

Q. And you have also presented what you state is a letter press copy of a letter from Mr. Comer to you, under date of December 26th, 1903?

A. Yes, sir.

Q. From whom did you secure that letter press copy of the letter from Mr. Comer to you?

A. I can't recollect the date of it. You see, the letter was written four years ago, and I don't know whether it was before Mr.

364 Comer died that he cut that out and sent it to me, because I have not the original; I have looked for that, and I know I have not. He may have cut that out and sent it to me, or we might have obtained it by looking over the files after his death.

Q. I thought you said something during your examination-in-chief, by Mr. Vertrees, about Mr. Coons giving you that copy?

A. I say I don't know whether it was Mr. Coons or Mr. Comer, or who, or when I got the letters; I can not recall the dates.

Q. You don't mean to tell us that you have produced here copies of all the correspondence that passed between you and Mr. Comer in relation to this matter, do you?

A. No, I do not. I do not recall just how much we did have,

but I take it for granted, on general principles, that there were other letters. That was four years ago, you remember.

Q. Now, at what price was this oil—three hundred gallons—charged to Rutherford?

A. I think Mr. Comer had charged that up before he got my letter, and told him what to charge, and told me what he had charged.

Q. Then he didn't obey your instructions about a normal charge?

A. The only knowledge I had on that is listening to what Mr. Holt said. I do not recollect what the price was, but it seems that he charged him more than what I would call a nominal price, and that is why I inferred he charged it before he got my letter.

Q. About that you don't know?

A. No, I don't know about that. I didn't look up what he had charged him for it.

Q. You have, you say, full control of the company's business in this territory?

A. Yes, sir.

Q. And have had for a number of years?

A. Yes, sir.

Q. You say that your company does not do this kind of business about revoking orders?

A. It does not. I never heard of such a case until this thing came up.

Q. Your company does not do anything to crush out competition?

A. It does not do anything in that way. There are a good many ways of crushing; some crush out themselves.

Q. You didn't do anything in this territory about crushing out by competition rival oil companies?

A. I don't know what you mean by that. Some crush themselves out by making prices that are ruinous, and have lost money by it. They are doing it now. As a rule, we are the pioneers, and first on the ground, and if a competitor comes in, necessarily, he has to make cuts to get it, and we meet it, and then he cuts again, and we
365 meet it, and then, finally, he is busted, and that is what is called crushed out. He comes in to take away our business, and cuts because he cannot take it, and he calls himself crushed.

Q. Now, you said you didn't know what I meant by the question. Do you know about the Cassetty Oil Company, in the city of Nashville?

A. I have heard of them, yes, sir.

Q. Do you know Mr. William M. Cassetty?

A. I do.

Q. Formerly president of the company?

A. I do.

Q. Do you know Mr. James McIlwain?

A. Yes, sir.

Q. Who is now president of the Cassetty Oil Company?

A. I do.

Q. I will ask you if, in 1902 or 1903, you didn't make an agree-

ment with the Cassetty Oil Company, by which you were permitted to fix the price of oil sold by the Cassetty Oil Company, and that your company, the defendant, Standard Oil Company of Kentucky, paid the Cassetty Oil Company five hundred dollars per month?

A. I didn't consider it in that light. It wasn't any agreement by which we were to fix the price.

Q. They had been, before that time, your active competitors in this market?

A. They had not.

Q. Do you mean to tell me they had not been selling oils and products of petroleum in competition with your products in this territory here at Nashville?

A. They were, but I think we sold them the larger portion of what they sold.

Q. But they did procure oils from other companies?

A. I suppose they did, sometimes.

Q. And which they sold in competition with your oils?

A. I presume they did. They had a certain trade, and we had a certain trade.

Q. Now, after that, they agreed to take oils from you altogether?

A. My recollection is—I can not say positively about that agreement; that was five or six years ago that you refer to—but my recollection is the proposition came from them to act as your agents, and would sell our oil as agents?

Q. And take oil altogether from you?

A. Yes, sir.

Q. And you fixed the price of that oil?

A. Of course we fixed the price of any agent's oil.

366 Q. And you gave them five hundred dollars a month?

A. I don't remember anything about the amount.

Q. What is your recollection about the amount?

A. I can't recollect the amount, but I know at their recommendation or suggestion, we had some arrangement by which they acted as our agents.

Q. That fact was concealed from the general public?

A. I don't think it was.

Q. That agreement was in writing?

A. Possibly it was.

Q. Now, I want you to produce a copy of that agreement?

A. I could not produce it now. That was made five years ago; it expired three or four years ago.

Q. Now, it ran over until 1906 or 1907, didn't it?

A. No, sir, I beg your pardon; we had no agreement running that length of time.

Q. Where is that paper?

A. I don't know.

Q. When did you see it last?

A. It has been three years since I saw it.

Q. You were the one that executed it upon the part of the Standard Oil Company?

A. I don't recollect that; it is quite possible, but, as I say—

Q. And you think it was not a bonus of as much as five hundred dollars?

A. I would not say about that.

Q. What is your recollection?

A. I don't remember. You must remember, in thousands of transactions that I pass on, I can not keep them in my head, particularly when it is five or six years ago. I know perfectly well it has not been in existence for three years.

Q. Why do you know?

A. Because I know we have not had any agreement in three years. We discontinued that method of doing business long ago.

Q. What method; paying a bonus to be permitted to name prices of oil to competing companies?

A. I beg your pardon; not paying a bonus to fix the price, but individual agencies.

Q. That is what you call creating an agent of the Cassetty Oil Company, here in Nashville?

A. Yes, sir; it was my understanding that they were acting as our agents.

Q. Under that agreement?

A. Yes, sir.

367 Q. They had been your active competitors up to that time and cutting prices?

A. No, I don't think they did. They were not what I would call active competitors.

Q. They were cutting prices?

A. I don't think so, to any extent. I don't think we had any trouble with their cutting prices, or our cutting prices.

Q. What was the reason for paying them five hundred dollars?

A. I don't know about the amount, but I think they figured they could sell our goods cheaper on a salary as agents, and I think, very likely, they did.

Q. When was the last time you saw that paper?

A. I will say I have not seen that paper in three years. I don't recollect that I have seen that paper in three years.

Q. What other companies have you had such an agreement with here in Tennessee?

A. Haven't had any.

Q. The Cassetty Oil Company was the only competing company in Nashville of your company?

A. And the only company I remember.

Q. That ever did attempt to compete?

A. There were others, but they were the only ones that were here any length of time. The Cassetty people were always regarded as our friends, because there never was a time that we did not sell them oil, and we sell them today, and I don't suppose we sell them all their oil at that, but still sell them just like we have always sold them.

Q. But you don't pay them the five hundred dollars a month now?

A. No, because they buy the goods outright; formerly they sold the goods for us.

Q. On commission.

A. No, we paid them a salary. The consideration was the use of their equipment, their warehouses, stables, stock and whatever they have got.

Q. That is what you call it?

A. Yes, sir; they were there, and they had their equipment.

Q. Have you had any talk with Mr. McIlwain about this recently?

A. I have not.

Q. Have you with Mr. Cassetty?

A. I don't believe I have seen him in two or three years.

Q. Was it Mr. McIlwain or Mr. Cassetty you made this arrangement with.

A. I don't recollect. It has been five or six years ago.
368 I remember, of course, I used to meet Mr. Cassetty quite frequently, and Mr. McIlwain; both of them used to come to Cincinnati, but I have not seen either one of them for some time.

Q. You had been cutting prices with them considerably before you made that agreement?

A. I think not.

Q. And done them considerable injury; wasn't that taken into consideration in fixing the price of five hundred dollars a month you paid them?

A. No, sir. No, sir; I have always regarded the Cassetty Oil Company as our friends. In other words, we have always worked along harmoniously together; if they wanted to buy a tank of oil or a carload of oil, they used to give us the preference.

Q. They did, after they entered into that agreement?

A. They were selling oil for us and would naturally take our oil.

Q. And do you mean to tell me that they didn't buy the oil outright from you, during the existence of that agreement?

A. I certainly do. I don't see how you could operate an agency if a man bought his oil outright.

Q. Then, they were not liable for any of the oil you shipped them, except what they sold?

A. That was all.

Q. And at the prices you fixed?

A. I don't know about the fixing of prices. It is natural to suppose they were selling the oil at the market, whatever the market was.

Q. Did that cover all of their business, and after they made that arrangement with you, they were not allowed to buy oils or the products of petroleum from anybody else?

A. I don't think there was any specific understanding on that.

Q. But that was all specified in the writing?

A. I don't think it was.

Q. Whatever the agreement was, was set out in the writing?

A. I don't know; of course, naturally, and I have not seen a copy of this document you have been talking about.

Q. And so the whole matter is hazy in your mind?

A. No, not exactly hazy. If you will go back six years, when

it was maybe made six years ago, or eight years ago, and have a thousand things to deal with, to keep all these details in my mind, I don't do it.

Q. You trust to the papers for that?

A. Oh, we get a lot of help on the outside about what we are doing.

Q. You trust to the documentary papers on file in your office?

A. I thought you meant the newspapers.

369 Q. Then answer my question?

A. Yes, sir.

Q. And then, you don't keep the papers.

A. If you had a lease or agreement of any kind, when that expires, you don't hold on to it for five or six years, when it is out of date and gone.

Q. Do you mean to say this agreement you had with the Cassetty Oil Company has been destroyed?

A. Why, certainly it has.

Q. Do you know of your own knowledge?

A. No, but I know on general principles and our rule, when an agreement expires, that is the end of it, and it is destroyed.

Q. You don't keep papers of that kind at all?

A. Not when they are expired, expired leases or agreements, or expired contracts of any description. We have millions of contracts made on oil business.

Q. This wasn't limited to one year, was it?

A. I don't know how long it was limited to; but, as I say, we have contracts selling manufacturing concerns; nearly all our large manufacturing customers contract on a year's basis, for they want to know what their goods are going to cost them a year.

Q. Was that agreement made here in Nashville?

A. I don't think it was.

Q. Where was it made?

A. I think those gentlemen came to Cincinnati to see me about it, or were up there, and got to discussing this question; they were not satisfied with their profits, and wanted to get on some basis.

Q. You had been cutting into their profits?

A. I don't know. I didn't know anything about their profits.

Q. Your business had been cutting into their business considerably?

A. I don't think so. I think we sold them about the same quantity of oil as they sold afterwards, and we sold them direct.

Q. You have an office and agency here?

A. Yes, we were doing business.

Q. And you had tank wagons here?

A. We had our trade and they had theirs.

Q. A full corps of officials?

A. I don't know whether the Cassetty people ever sold any oil by tank wagons. I think their business was principally lubricating oils.

Q. Weren't they advertising themselves then, and didn't they continue to do so, as independent oil dealers?

A. I could not tell you about that.

370 Q. That wasn't a part of the agreement, that they were to so continue to advertise themselves?

A. I don't remember.

Q. You didn't need an agent?

A. No, not particularly.

Q. What you needed was to control the Cassetty Oil Company?

A. I don't know about that. They may have had a certain class of trade or certain brand of goods we didn't make that they could sell.

Q. Who was your superintendent here at the time this agreement with the Cassetty Oil Company was entered into?

A. I don't know. It could not have been Comer, I guess, for I don't think he had been here that long. It might have been Coons.

Q. But those matters you didn't allow your superintendents to know anything about it?

A. I don't know. Coons may have known about it, if he was here. I don't think there was any secret about it, so far as our organization was concerned.

Q. It was never known in this community that the Cassetty Oil Company was your agent?

A. I think it was. I think Mr. Ilwain and Mr. Cassetty were responsible for that. If they didn't tell it, or let it be known generally, it was their fault, and none of ours. It wasn't any general understanding that they were to make any secret of it.

Defendant excepts to all of the foregoing questions and answers as to the Cassetty Oil Company as incompetent and irrelevant.

Redirect examination.

By Mr. VERTREES, for Defendant:

Q. You have mentioned the fact that Mr. Hand is the general manager of the company. What is his name?

A. C. H. Hand.

Q. What is his position and what are his duties?

A. He is the general manager; he looks after the physical operations of the business.

Q. What is that?

A. The running of tank wagons, purchase of live stock, purchase of equipment, and visiting stations and seeing what shape they are in.

Q. Would the matter of reports of agents and correspondence with reference to such matters as this go before him?

A. No, that is considered the merchandising or marketing end of the business.

371 Q. And did he have anything to do with that?

A. No, sir.

Q. That is within your jurisdiction?

A. Yes, sir.

Q. Were you at any time directed by your counsel to search for the papers bearing on this question, and particularly with reference to the first report Holt made or sent in as to having countermanded these orders?

A. Yes, sir; you wrote me to find that report, that it was very important. I looked everywhere, and had one of our representatives go to Nashville and see if it could be found.

Q. Was search made in your office and that office?

A. Yes, sir; search was made there. And it was reported back that Mr. Comer said he turned his copy over to you; that you said it was a very valuable document, and would retain that, and he told you, I think, Holt had a copy and I had one.

Q. Did you ever find it?

A. No.

Q. Was that report ever brought to your attention in any way?

A. No, sir.

Q. How many salesmen were in the company at that time?

A. I should say over a hundred—somewhere from a hundred to a hundred and fifty; it varies according to the time of the year.

Q. How often do they report?

A. Daily, except Sunday.

Q. Are all of them brought to your attention?

A. Only those that have matters of vital importance, referring to the merchandising end of the business.

Q. As I understand you, a hundred and fifty reports come in a day, and if anything relates to anything special, it goes to you?

A. If it refers to the price or competition, or marketing, it is referred to me, but if to the physical properties, it is referred to Mr. Hand.

Q. If that report had stated that Mr. Holt had secured the countermand of these orders by gifts of the company's oil, would it have been laid on your desk?

A. It certainly would, as that would have been a very unusual transaction.

Q. Was any such transaction ever brought to your attention?

A. It never was, and the report of Holt was never brought to my desk, for the reason that there was nothing of importance in it.

372 Recross-examination.

By Mr. CATES, Attorney General:

Q. About what time was it when your counsel, Mr. Vetrees, made inquiry of you for a copy of the Holt daily report, referring to the transactions at Gallatin, in relation to countermanding the orders?

A. I think it was some time after this case at Gallatin started; I don't recall when, but I know he has asked me since.

Q. And before the trial at Gallatin?

A. I am not sure it was before the trial.

Q. Well, it was wanted for use at the trial?

A. I would not be surprised, but has been more urgent, however, since then.

Q. At that time, you didn't recall to have seen Holt's report at all?

A. No, sir, because I infer there was nothing of importance on it; therefore, it wasn't brought to my attention.

Q. You can not recollect ever to have seen it?

A. No, sir.

Further this deponent saith not.

C. T. COLLINGS,

By Stenographer and Notary.

Notary fee due.

Stipulation.

It is stipulated and agreed, by counsel present, representing both sides, that the indictments against the Standard Oil Company, C. E. Holt and O'Donnell Rutherford were returned by the Grand Jury of Sumner County during the May term, 1904, and the case called the "Love case" was tried during the September term, 1904, beginning on September 20th, 1904.

The case was appealed to the Supreme Court of Tennessee sitting at Nashville, and was tried there February —, 1905, and was decided by the Supreme Court of Tennessee, at Nashville, on the 23d day of February, 1907, and the judgment was entered on March 16th, 1907.

[The letters (1) from Mr. Collings to Mr. Comer, dated December 26th, 1903, and (2) from Mr. Comer to Mr. Collings, dated December 26, 1903, and (3) from Mr. Collings to Mr. Comer, dated December 28, 1903, on exhibit with Mr. Collings' deposition, being also set out therein, are not reported here. They are to be found *in the deposition*, at pages 353, 356 and 363; and as *exhibits* 373 to the deposition at pages 403, 404, 410 and volume 2 of the transcript of the record.]

Deposition of S. P. Wilson. Filed October 28, 1907.

(Trans., Vol. 2, p. 413.)

S. P. WILSON called, and, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. Please state your name and age?

A. S. P. Wilson, forty-seven years.

Q. Where do you live?

A. No. 310 North Vine Street, Nashville, Tennessee.

Q. Were you ever connected with the Standard Oil Company?

A. Yes, sir.

Q. Are you now?

A. No, sir.

Q. When did you sever your connection with the company?

A. The first day of March, of this year.

Q. How long were you connected with them?

A. I went to work for them in July, 1889.

Q. And remained in their service until 1907?

A. Yes, sir.

Q. In what capacity?

A. Well, during the time I was in several different capacities. I was cashier for them at first, and I was manager of East Tennessee division for nine years before I came to Nashville.

Q. What would be your title as manager.

A. Special Agent.

Q. Where were you located?

A. Knoxville.

Q. When did you come to Nashville?

A. In May, 1900.

Q. Who was the special agent in charge of the Nashville office then?

A. S. W. Coons.

Q. Did any one succeed Mr. Coons?

A. Mr. J. E. Comer.

Q. And what was your position at the Nashville office?

A. I was assistant special agent.

374 Q. What were your duties, especially?

A. I had charge of the accounting for the first few years, and I looked after certain part of the correspondence pertaining to the market.

Q. Speaking especially with reference to the year 1903, what were your duties then?

A. My duties were, practically, at that time, as when I first came to Nashville, assistant special agent.

Q. What, if anything, would you have to do with the reports of agents that were sent in every day, daily reports of the agents?

A. The reports of the agents pertaining to stock were checked up against the records, and that is a little different from the salesmen's reports.

Q. Take the salesmen's reports?

A. They were read and notes made.

Q. Would they come under your supervision?

A. Yes, sir, the salesmen's reports; they all passed through my hands.

Q. You, of course, were acquainted with Mr. Comer?

A. Yes, sir.

Q. He is dead?

A. Yes, sir.

Q. Were you in the service of the company when he died?

A. Yes, sir.

Q. Do you remember when he died?

A. I think it was the 13th of October, 1906; that is my recollection of the date.

Q. Are you acquainted with a salesman, Mr. C. E. Holt, then in the service of the company?

A. Yes, sir.

Q. Were you acquainted with the local agent at Gallatin, a man named O'Donnell Rutherford?

A. Yes, sir.

Q. Were you acquainted with Mr. James Whitesides, at Gallatin?

A. Yes, sir.

Q. What connection had he with the company at any time?

A. At that time he had none.

Q. Did he previously?

A. Yes, sir; he was local agent prior to Mr. Rutherford.

Q. Who succeeded him?

A. O'Donnell Rutherford.

Q. Do you know whether or not Mr. Whitesides recommended Rutherford to the company?

A. Yes, sir; he did.

375 Q. You have heard of this trouble at Gallatin, the origin of this litigation, about the countermanding of orders up there by the gifts of oil by Holt?

A. Yes, sir.

Q. You were in the service of the company at that time as assistant special agent?

A. Yes, sir.

Q. What was the first knowledge or information you had of that business being done, of that transaction, Mr. Wilson?

A. At the time I met Mr. Jim Whitesides in Nashville, and we were talking about Rutherford, and he wanted to know how he was getting along, and I told him he was getting along as bad as he could—that is, he was short in stocks, and I could not get any information out of him at all. I had written him a number of letters. I think that was in December, 1903; I am not positive about the year, but I am positive about the month.

Q. What did Whitesides say?

A. Mr. Whitesides asked me if I knew the cause of that shortage, and I told him I did not, unless there was some oil delivered that had not been accounted for, and he told me then that they had made some deliveries of oil and never made charges for it, in order to get some orders countermanded given to the Evansville Oil Company.

Q. Who did he say did that?

A. Said that was done on the authority of Holt.

Q. Done by O'Donnell Rutherford?

A. O'Donnell Rutherford made the deliveries.

Q. Where did that conversation take place?

A. My recollection is that it was in the transfer station down here.

Q. What did you do, anything, after getting that information?

A. I reported it to Mr. Comer immediately, as soon as I got to the office, and Mr. Comer immediately took the matter up with Rutherford by telephone to get him in, and I think it was possibly a day or two before Rutherford got in to confirm Whitesides' statement.

Q. Rutherford did come?

A. Yes.

Q. And in a day or two, you think?

A. Yes, sir.

Q. A very short while, anyway?

A. Yes, sir, but I didn't see Mr. Rutherford. Mr. Comer talked to him himself.

Q. Do you know the fact that he came?

A. Yes, sir; I know he was there that day.

376 Q. And do you know the fact that Mr. Comer communicated with him by telephone?

A. Yes, sir; he put in a call while I was at his desk, and told him about what Whitesides had said.

Q. You say he put in a call for O'Donnell Rutherford?

A. Yes, sir; long-distance call.

Q. Before you left the office?

A. Yes, sir; before I left the office.

Q. Do you know, of your own knowledge, what passed between Rutherford and Mr. Comer?

A. No, sir.

Q. Did Mr. Comer inform you?

A. He told me he went after him pretty straight, and told him that the shortage had to be accounted for.

Q. What was the course of business at Gallatin; I mean, with reference to the handling of it, was it, or not, charged to any one when shipped there?

A. It was charged to the station, as station stock.

Q. You had reports of what is called inches, as well as sales?

A. Yes, sir.

Q. Suppose there was a shortage, who was charged with that?

A. To the agent, because he is responsible for shortage.

Q. What I want to get at, is the person to whom the company looks for any oil or stock, is it the person or agent in charge of that station?

A. Yes, sir.

Q. And who was that agent at Gallatin?

A. O'Donnell Rutherford.

Q. Did you see Mr. Holt about these times?

A. I don't remember, Mr. Vertrees, when it was that Holt came in; but it was my impression it was after Rutherford made this visit to Nashville.

Q. Did you have any talk with him?

A. I had no talk with him at the time.

Q. Do you know whether Comer did?

A. Only from what Mr. Comer told me?

Q. What did he say?

A. Mr. Comer told me that he told Holt that he had to pay for the oil, if O'Donnell Rutherford did not.

Q. Now, recurring to those daily reports, did any report that came in from Rutherford or Holt, the salesman, and you say they passed through your office?

A. Yes, sir.

Q. Did any of them contain any statement to the effect that these orders at Gallatin had been countermanded by gifts of oil, any of them?

377 A. No, sir. The report stated that certain orders had been countermanded, and the trade was satisfied with our goods, but there was no intimation in any of them that any gift had been made of money or oil.

Q. You said you were special agent for the company how many years?

A. Nine years.

Q. And you were out at the Nashville office how many years?

A. Seven years.

Q. Now, I ask you as to the course of the business in that matter of securing countermand of orders of competitors by gifts of oil. Was that, or not, their practice?

A. I never heard of it until this case came up.

Q. Did you, as agent, ever have anything of that kind come up?

A. No, sir.

Q. Or any of your sub-agents?

A. No, sir.

Q. Or any one at the Nashville office, to your knowledge, except this?

A. No, sir.

Q. As I understand you, that is the first case of which you had any knowledge?

A. The first case of which I had any knowledge.

Q. And, as I understand you, your first knowledge of that was when Jim Whitesides happened to tell you here in Nashville?

A. Yes, sir.

Q. You know that was in December?

A. Yes, sir; and I think it was in 1903. I am not positive about the year, but it was the time this trouble came up.

Q. And that a day or two before O'Donnell Rutherford came down in response to Mr. Comer's call?

A. Yes, sir.

Q. Had you heard of it before that?

A. No, sir.

Q. Had you seen it in any papers?

A. No, sir; I hadn't heard of it.

Q. Are you connected with the company in any way now?

A. No, sir.

Q. You severed your connection in the early part of the year?

A. Yes, sir.

Q. Was it at the time the Nashville office was changed?

A. No; the accounting department was abolished the first of January, but I remained there two months, getting up data and matter relating to accounts.

378 Cross-examination.

By Mr. CATES, Attorney General:

Q. Do you remember what time in December, 1903, it was that Whitesides saw you?

A. It was after the middle of the month, but I can not recall the exact time.

Q. Now, do you recollect that you personally saw all of the reports which Mr. Holt made in regard to his doings at Gallatin?

A. State that again, please, sir.

(Question read by stenographer.)

A. No, I can not remember that I saw every one of them. Let me explain that, please. We file those reports together, and we see that every day comes in, and if there is a date missing, we go back for it. Now, I can not say positively where there were any reports I didn't see, but those filed according to dates I did see.

Q. You don't know what passed between Mr. Holt and Mr. Comer?

A. No, sir.

Q. Mr. Holt came to the office nearly every Saturday, didn't he?

A. Yes, sir.

Q. And spent the time with Mr. Comer.

A. No, sir, he was around in Mr. Comer's office part of the time, and part in my office.

Q. He was directly under the control of Comer?

A. Yes, sir.

Q. Mr. Comer gave him instructions direct?

A. Yes, sir.

Q. Now, you say you left the employ of the company about March 1st, 1907?

A. Yes, sir.

Q. They still have an office here?

A. They have a distributing office here.

Q. Were the papers all out there when you left?

A. Yes, sir.

Q. Papers and documents pertaining to the office were all out there when you left?

A. Yes, sir.

Q. Who is in charge of the office here now?

A. Mr. T. P. Wilson.

Q. Yours are S. P.?

Yes, sir; no relation.

Q. You didn't see Rutherford when he came down?

A. No, sir; I did not.

379 Q. How long did Rutherford remain in the employ of the company?

A. You mean after this thing?

Q. Yes.

A. That is a point I am not certain about?

Q. You don't remember how long he remained as agent at Gallatin?

A. No, I do not.

Q. Do you remember by whom he was succeeded?

A. I cannot recall the man's name now.

Q. Baber?

A. That is the fellow—W. H. Baber.

Q. Did the Nashville office have control of the Standard Oil Company's business in Dover, Stewart County?

A. Not the Standard Oil Company of Nashville.

Q. Under what jurisdiction is that?

A. I am not positive of that. Isn't that on the river?

Q. Yes.

A. I am not positive, but I don't think they did.

Q. Were you not examined as a witness on the trial of the Holt case, up at Gallatin?

A. No, I was not.

Further this deponent saith not.

S. P. WILSON,

By Stenographer and Notary Public.

Notary fee due.

Deposition of Charles T. Cates, Jr. Filed October 28, 1907.

(Trans., p. 430.)

The deposition of C. T. CATES, JR., taken by consent, at the same time and place, oath of the witness being waived.

— Direct examination.

By Mr. VERTREES, for Defendant:

Q. General Cates, you are the attorney-general for the State of Tennessee?

A. Yes, sir.

Q. And, as such, argued the case and conducted the trial of the case, in the Supreme Court of Tennessee, of the State of Tennessee
380 *vs.* the Standard Oil Company and C. E. Holt, appealed from the Circuit Court of Sumner County, tried at the December term, 1904, and decided at the December term, 1907, did you not?

A. I argued the case for the State, when it was tried, and represented the State in the Supreme Court.

Q. I indicated the correct terms of court at which these proceedings were had?

A. Yes. I think we have stipulated about that.

Q. When was the case decided?

A. My recollection is that the case was decided some three or four weeks before the judgment was finally entered. I endeavored to refresh my recollection on yesterday by telephoning to the clerk, and, if I remember right, he stated that the case was actually decided on Saturday, February 23d, 1907.

Q. But you do remember that there were several weeks' intervention before entering of judgment?

A. Yes, unquestionably.

Q. What was the cause of the delay in entering the final judgment?

A. The delay was at first caused by the fact that Mr. Holt was not present when the decision was announced, and Mr. Vertrees, as his counsel, agreed to have him there at a later date, whether the follow-

ing Saturday or not, I do not now recall, but there was some understanding with reference to that.

Q. Wasn't the principal delay, though, due to the fact that there were negotiations between you, as Attorney General, and between Mr. John J. Vertrees, as counsel for the defendant, looking to a settlement and compromise of the three cases which were pending at Gallatin, not yet tried, but found by the Grand Jury at the time this Love case was, which delay was caused by your inability to have a conference which you desired with Attorney General Peck, district attorney at Gallatin, and Judge B. D. Bell, the judge there?

A. Part of the delay was unquestionably caused by that, and I shall make a brief statement of the whole matter, so far as I now recall it.

Holt wasn't present when the judgment was rendered. I—remember now whether Mr. Vertrees was present or not; in fact, I don't remember whether I was present when the judgment was handed down, but I was advised that Mr. Holt was not there. Later on, Mr. Vertrees stated that he would have Holt present, and asked me what I was going to do with Holt, and I told him if Holt didn't pay his fine, he would go to jail or be imprisoned; then, whether in a jocular way or not I don't know, and didn't then know, Mr. Vertrees suggested that probably Holt could take the oath and be discharged, and, of course, we didn't agree about that; I said something to

Mr. Vertrees about his client going to jail, and that it
381 would be a rare monument to the generosity or infamy of the Standard Oil Company, and we had some talk about the matter, and my recollection is that he stated he would advise his client to pay that fine, if the cases pending at Gallatin could be disposed of, and I told him, while I had no control over those proceedings, that I would recommend to General Peck the disposition of those cases as to Holt, upon a reasonable fine and the payment of the costs. Thereupon, I saw General Peck, and he had some conference with Judge Bell, and later on, perhaps, Mr. Vertrees, General Peck and myself had a talk at the Tulane. I am not sure about that, but it seems to me something like that occurred. I remember Mr. Vertrees and General Peck did come to my room at the Tulane, and I do not recall whether on that matter, but I do not recall any other matter they could have come there to discuss, unless it was this. It was agreed by Judge Bell and General Peck that the fine be assessed against Holt—of course, the criminal cases in the Circuit Court could not be further prosecuted against the Standard Oil Company—would be a hundred dollars in each case, and so I reported that to Mr. Vertrees, and then, as I understood it, Mr. Vertrees paid the fine.

Q. General, wasn't a hundred dollars a minimum fine that could be fixed under the statute in either of the cases?

A. That is my recollection of the statute.

Q. And was it not stated by Mr. Vertrees that he would advise his people to pay this fine for Mr. Holt, provided those three cases still pending at Gallatin could be disposed of and settled by the same agreement?

A. That is the way I understood it. Final disposition was to be made as to Holt and the indictments against the Standard Oil Company were to be quashed or dismissed, in accordance with the opinion of the Supreme Court.

Q. That was the condition all the time?

A. Well, yes; I will say that I so regarded his statement to me, and I will state further that I recommended such course to General Peck and Judge Bell through General Peck, in order to secure a final disposition of the cases pending in the Circuit Court at Gallatin. But I want to say here, it was immaterial to me whether the Standard Oil Company paid Holt's fine or not. I cared nothing about that, one way or the other, but was gratified at the final disposition of the case.

Q. Were you indifferent to the payment of the fine?

A. Yes, in a sense. I was indifferent, because, as I stated to Mr. Vertrees at the time, the fact of the imprisonment of Holt would be an object lesson in regard to the Standard Oil Company, and while I would like to collect the fine, I knew, after that decision was rendered by the Supreme Court, I was going to have to take other proceedings against the Standard Oil Company, and I do
382 want to say, it would have given me no particular pleasure to see Holt imprisoned.

Q. Didn't Mr. Vertrees represent to you that Holt was an impecunious young man and had nothing?

A. He did that.

Q. And was a young fellow that had nothing?

A. He did that; yes, sir. The situation, as I understood it, and supposed Mr. Vertrees understood it, was that Holt would have to go to jail unless the Standard Oil Company paid his fine.

Q. Didn't you also understand from him that they were under no agreement or obligation to do it; that I was volunteering this thing?

A. I understood that Mr. Vertrees was making the statement to me in order to secure a settlement of the cases still pending below, against Holt, but I don't now recall that anything was said about the Standard Oil Company being under any obligation or not, being under any obligation to pay the fine.

Further this deponent saith not.

Deposition of John J. Vertrees. Filed October 28, 1907.

(Trans., Vol. 2, p. 438.)

The deposition of JOHN J. VERTREES, taken at the same time and place, by agreement, oath being waived; he deposed as follows:

In view of the statement of Mr. Collings that the report known as Mr. Holt's report was called for and given over to me as counsel for the company, I desire to state that that report was submitted to me, and I have read it. When the case was tried at Gallatin, I did not have it at Gallatin with me, and to my knowledge, no one had it. My recollection now is that Mr. Comer stated, or some one

stated, but the record will show, that it was at Nashville, but the fact that it was not produced on the trial was very much remarked on in the course of the argument by the State, which impressed upon me the fact of the contents of the paper.

I do remember that the report or paper was only written in pencil. I mean by that, one of these indelible pencils, and it was manuscript, not typewritten, and it was in the form of a letter, in which Mr. Holt was reporting to Mr. Comer that he had succeeded in countermanding certain orders. I do not remember the date of that letter, but I do recall that there was nothing in the letter indicating that gifts of oil had been used to effect the countermands. What became of the letter, I am unable to state. I did, as Mr. Collings

383 has stated, represent to Mr. Comer its importance, and am sure at one time that I had it, quite sure of that. Whether I returned it to Mr. Comer, or mislaid it or not, I do not know.

It is not in the file of the papers and has not been in the file of papers that I keep relating to this business. I caused my office to be searched by my clerk, by my brother, Maj. Vertrees, and myself, our iron safes and places of keeping papers, and my desks; searched very carefully twice, and not so carefully another time, and have been wholly unable to find any trace of it, or anything indicating where it might be. I also, at the same time, requested the Standard Oil people to make a like search. I am unable to state whether the paper was left with me or not. My impression is that it was not left with me, but it might have been.

Now, as to the settlement of these matters; I have heard the statement of Gen. Cates, and as I understand it, it is substantially correct. In fact, as I understand it, excepting that it is my recollection that I was clear to state to Gen. Cates that this was by way of compromise and I would not advise the company to do it, unless the other three cases were settled along with it, and that the delay with reference to Mr. Holt was only one of a few days' duration, he being out of the city at the time the opinion was delivered, and that the first delay on his part was by reason of his inability to see Attorney-General Peck, but that he finally saw or communicated with Gen. Peck, and we did have the conference he has suggested, but that then he and Gen. Peck were unwilling to proceed any further in the matter without the approval of the Circuit Judge, Judge Bell, and there was still further delay until Judge Bell could be communicated with or his approval secured, with the final result that on the day that this bill was filed in this case, and about thirty or forty minutes before the train left Nashville for Gallatin, at the Supreme Court room, at the Capitol, we came to an agreement that the fine of Holt should be paid, and the costs of that case; that a fine of one hundred dollars, the minimum fine, should be paid in each of the three cases pending at Gallatin, and the costs, and the cases would be dismissed as to the company and a judgment of guilty as to Holt, and the fine—nothing being said by either of us, it being purely a matter of inadvertence on my part, as to Rutherford. That is the way I recall the matter as it occurred between Gen. Cates and myself.

Cross-examination.

By Mr. CATES, Attorney-General:

Q. Mr. Vertrees, do you know whether or not the paper shown you was in the handwriting of Holt?

A. No, sir.

384 Q. I refer, of course, to what Mr. Comer brought you as being one of Holt's daily reports?

A. I never knew Mr. Holt until this matter came up, and whether I was acquainted with him at that time or not, I do not know, but I am quite sure I didn't know his handwriting, and don't know it now.

Further this deponent saith not.

Gen. CHARLES T. CATES recalled.

Filed October 28, 1907. (Trans., Vol. 2, p. 443.)

Gen. C. T. CATES, JR., continued:

I had no idea that the propriety of my proving, or attempting to elicit testimony showing the payment of Holt's fine by the Standard Oil Company would be questioned, until I received from Mr. Vertrees a letter dated October 9, 1907, and which I herewith submit as Exhibit A to this statement, along with my reply thereto, under date of October 12, 1907.

Further this deponent saith not.

Said letters above referred to are as follows:

NASHVILLE, TENN., *October 9, 1907.*

"Chas. T. Cates, Attorney-General, Knoxville, Tenn.

"DEAR SIR: I will take the deposition- of Mr. C. T. Collings and Mr. C. E. Holt at our office here on Saturday, the 19th, inst. I understood you to say over the telephone that that day would be more suitable for you.

"You will remember when taking the depositions at Gallatin, you asked one of the witnesses if the Standard Oil Company had not paid the fines of Mr. Holt. In view of what passed between us with respect to that matter, I think you ought to withdraw that question. I explained to you fully the reason why the company did pay the fine, and I do not think on the facts of the case, that it ought to be left in a situation so that the inference can be drawn that the company was behind Holt in his offense. Think of this, for unless you do it, I shall be obliged to take your deposition on that subject, to prove what passed between us, and unless you are willing to do what I have suggested you will take this as notice that I will take your deposition on that point in my office.

"Yours very respectfully,

"JOHN J. VERTREES."

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"KNOXVILLE, October 12, 1907.

"Mr. John J. Vertrees, Attorney at Law, Nashville, Tenn.

"DEAR SIR: Yours of the 9th to hand and noted. You are already advised that it will be convenient for me to cross-examine your witnesses, Collings and Holt, at your office on Saturday, October 19.

"Now, replying to your statement that you think I ought to withdraw certain questions propounded to one of your witnesses and intended to elicit the fact of payment by the Standard Oil Company of the fines assessed against Holt, and that unless I shall agree to withdraw said questions you shall feel obliged to take my deposition on that subject, to prove what passed between us, you will permit me to say that I am not a little surprised that you should be of the opinion that I am in any way estopped, by reason of anything which passed between us, to show that the Standard Oil Company did pay the fines assessed against Holt, if such proof be material to the issue pending in the Chancery Court at Gallatin.

"Further, I know of nothing whatsoever connected with that matter, either directly or indirectly, which warrants the suggestion that the questions referred to were improper, and in view of your statement that you will take my deposition unless I agree to withdraw the question, I must decline to do so, and you can pursue such course in regard to taking my deposition as to you may seem proper.

"Yours very respectfully,

"C. T. CATES, JR.,
"Attorney-General."

Deposition of C. I. Carrico. Filed Nov. 14, 1907.

(Trans., Vol. 2, p. 452.)

In the Chancery Court of Sumner County, Tennessee.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY OF KENTUCKY.

The deposition of C. I. Carrico, taken November 14, 1907, at the office of the clerk and master of the chancery court at Gallatin, Tennessee, to be read as evidence on behalf of the defendant in the trial of the above entitled cause.

Taken in the presence of Hon. C. T. Cates, Jr., Attorney-General, on behalf of the State; Hon. John J. Vertrees, and Hon. Jas. W. Blackmore, solicitors for defendant, and Buford Duke, stenographer and Notary Public.

386 Caption, certificate and all formalities expressly waived.

It is agreed that the witness' evidence may be taken down in shorthand, he having been first duly sworn, the same transcribed into typewriting and signed by the stenographer, the signature of the witness to his deposition being expressly waived.

Said witness, C. I. CARRICO, called on behalf of the defendant, being first duly sworn, deposed as follows:

Direct examination.

By Mr. VERTREES, for Defendant:

Q. 1. State your age and your residence?

A. I am in my 37th year, and my residence, at the present time, is Owensboro, Ky.

Q. 2. What is your business or occupation?

A. Traveling salesman for the Standard Oil Company.

Q. 3. You mean, the Standard Oil Company of Kentucky?

A. The Standard Oil Company of Kentucky.

Q. 4. How long have you been traveling salesman for that company?

A. Since 1901, regularly.

Q. 5. How long have you been connected with the company in a business way?

A. Since 1893.

Q. 6. What was your position or connection with the company from 1893 to 1901?

A. I was sub-agent and superintendent of warehouses.

Q. 7. Are you acquainted with Mr. O. T. Reynolds, of Dover, Tennessee?

A. I am.

Q. 8. When did you make his acquaintance?

A. In the latter part of 1903.

Q. 9. Where did he live then?

A. Dover, Tenn.

Q. 10. Did you travel through that territory for the Standard Oil Company then?

A. Yes, sir.

Q. 11. What were your duties as traveling salesman at that time?

A. To look after the tank wagon service and installing agents, and checking the agents—that is, taking an inventory of the goods on hand.

Q. 12. What would you do with that inventory?

A. Send it to the Standard Oil Company at Louisville.

387 Q. 13. Did you fix the prices of oil?

A. I did not.

Q. 14. Who fixed the prices at which oil would be sold?

A. Mr. S. W. Coons, Special Agent.

Q. 15. Where was he located?

A. Louisville, Ky.

Q. 16. Was Mr. Reynolds at that time, or at any time, a local agent for the Standard Oil Company, and if so, then state where and when?

A. He was appointed along in 1903, about October or November, at Bear Springs, Tenn.

Q. 17. Did he have any other place under his jurisdiction?

A. He had the circuit of Bear Springs, comprising adjacent towns.

Q. 18. Do you remember what they would be?

A. No; I could not recall all of them; they were, Dover, and he also had a relay station at Erin, and a storage tank there.

Q. 19. How far distant was Dover from Bear Springs?

A. As well as I remember, about eighteen or twenty miles.

Q. 20. How long was he agent for the company?

A. I think that he was checked out in February or March, 1904.

Q. 21. So, he would have been agent about four months or something like that, or five months?

A. Yes, sir; about five months.

Q. 22. Who checked him out, as you call it?

A. I checked him out.

Q. 23. Do you know why he was dispensed with?

A. Yes, sir; it was because he failed to make the proper trips with the wagon and look after our business in a proper way.

Q. 24. Mr. Reynolds has testified as to a conversation with you as to the procuring of milk cans in order to give the oil of the company away over in the neighborhood of Dr. Scarabrough—I don't remember his initials, but a Dr. Scarabrough—who seemed to be a merchant somewhere. Are you acquainted with Dr. Scarabrough?

A. Yes, sir.

Q. 25. Do you know his name?

A. Dr. J. H. Scarabrough.

Q. 26. Where does he live?

A. Tharp, Tenn.

Q. 27. Is he still living?

A. Yes, sir; he was last week.

Q. 28. What do you know about the matter to which I have referred? Whatever you know, state it.

A. Well, I made a trip over to Tharp, as well as other points throughout the circuit, and I found Dr. Scarabrough was
388 buying his oil in barrels, principally from the Standard Oil Company, at Catawba, Ky., this oil being shipped by boat on the Cumberland River to his shipping point. It is the policy of the company to distribute our oils on a bulk basis, in order to facilitate the handling and facilitate cleanliness and actual measurement of the oils, and, owing to the roads being very hilly and muddy, Mr. Reynolds claimed that he could not make the trip. I suggested that we send him some milk cans, which we handle at various stations, and in this way to carry any amount, from ten gallons on up to as much as he needed, and he would have no load to return with.

Q. 29. You say you have milk cans at various stations?

A. Yes, sir.

Q. 30. Have you them now?

A. Yes, sir.

Q. 31. Did you have then?

A. Yes, sir.

Q. 32. State the object of having them and how the business is conducted with them?

A. The capacity of those cans is ten gallons, and they are built with a top that fits down about three or four inches, down into the

can, and we use them to facilitate the handling of oil, when the roads are muddy and rough, as the wagons we have hold from 310 to 420 gallons, and they are too heavy for a two-horse wagon during real heavy roads, and bad weather in winter time, therefore we have these cans that we can fill up at our plant, and if he telephones or writes us he wants a hundred or a hundred and fifty gallons, we put that much in any requisite number of cans and make the delivery to his store.

Q. 33. Now, the tank wagon delivery system means the delivery in large iron tanks on a wagon?

A. Yes, sir; to the merchant.

Q. 34. And that itself is of considerable weight?

A. Yes, sir.

Q. 35. Aside from its load?

A. Yes, sir; our wagons will weigh from 1,750 to 3,200 pounds, our largest wagons.

Q. 36. You mean loaded or unloaded?

A. Our largest wagons, 620 gallons, weigh from 1,750 to 3,200 pounds. I have weighed several of them.

Q. 37. Now, do I understand you to say that milk-can business, as you describe it, was then a regular business of the company, and is now?

A. Yes, sir; it is now.

Q. 38. And was it then?

A. Yes, sir.

389 Q. 39. How would they be sent out, on tank wagons or other wagons?

A. No, sir; on farm wagons, or an ordinary dray.

Q. 40. Or a farm wagon, according to the quantity desired?

A. According to the quantity that the merchant would desire for his business.

Q. 41. Did anything pass between you and Mr. Reynolds as to this milk wagon, or milk-can business, I mean?

A. I suggested we send these cans, and he could supply Dr. Scarabrough with oil, and not have to take the tank wagon over the heavy roads.

Q. 42. Did you, or not, advise or suggest to Mr. Reynolds to give away oil of the company, to carry it out in cans, and give it away in the vicinity of Dr. Scarabrough?

A. No, sir.

Q. 43. You say that he was buying oil principally from the Standard Oil Company?

A. He so stated to me.

Q. 44. From what company?

A. From the Standard Oil Company, shipments from Cadiz, Ky.

Q. 45. Was he then, at that time, buying any oil from the Standard Oil Company of Kentucky?

A. He was.

Q. 46. But the tank wagon, as I understand you, wasn't then going to his place and locality?

A. As far as I know, never made a trip there.

Q. 47. I will ask you, if you, as agent of the company, at any time, there or elsewhere, ever gave away the oil of the company to customers or other persons?

A. I never did.

Q. 48. Have you since that time?

A. No, sir.

Cross-examination.

By MR. CATES, Attorney General:

Q. 49. Now, you say Mr. O. T. Reynolds became the local agent of the Standard Oil Company of Kentucky in the latter part of 1903?

A. Yes, sir; at Bear Springs. We had no agency at Dover, because not accessible to tank car shipments.

Q. 50. Mr. Reynolds, however, lived at Dover?

A. Yes, sir.

Q. 51. And that territory is under the jurisdiction of S. W. Coons, special agent or superintendent at Louisville?

A. Yes, sir.

390 Q. 52. And it is the special agent that you say fixes the price of oil?

A. Mr. S. W. Coons fixes the prices, that is, gives me my authority for making the prices in the territory.

Q. 53. Now, do you mean to say that Dr. Scarabrough had, prior to your conversation with Mr. Reynolds, and to which reference has been made, had been buying oil from the Standard Oil Company of Kentucky?

A. He had, sir.

Q. 54. You were asked if Dr. Scarabrough was living, and you said that he was last week?

A. Yes, sir.

Q. 55. Are you the man that went there and got from him, or asked him for his papers and correspondence?

A. I asked him for his invoices.

Q. 56. How came you to go there?

A. In reference to this case that is on hand.

Q. 57. You had been told that Mr. Reynolds had testified?

A. Yes, sir.

Q. 58. And you were sent there to get his papers?

A. No, I was up there with no mission in particular.

Q. 59. Why did you go there?

A. I went there to see what Mr. Scarabrough had to say about the purchase of oil, about the deliveries of oil that should have been made or we had made.

Q. 60. Who sent you there?

A. Mr. S. W. Coons.

Q. 61. And without any mission in particular.

A. Without any special mission in particular, excepting to see where he had been buying his oil at that time and get any data relative to this case.

Q. 62. You found Dr. Scarabrough a very old man?

A. He is.

Q. 63. And in very poor health.

A. I don't know about that, sir.

Q. 64. He is not able to go away from there now, is he?

A. Yes, sir; he was at a church meeting that afternoon.

Q. 65. And you had a conference with him?

A. Yes, sir; at his home, in his office.

Q. 66. When did you first make up your mind that Dr. Scarabrough was buying oil from the Standard Oil Company of Kentucky in the latter part of 1903 and in 1904?

A. It was on my visit there during the latter part of 1903.

Q. 67. Didn't you say to Mr. Reynolds, or ask Mr. Reynolds, why doesn't Dr. Scarabrough buy oil from the Standard Oil Company?

A. No, sir.

Q. 68. Didn't you ask him why the Standard Oil Company, or he, as the agent of the Standard Oil Company, was not selling the oil?

A. I asked him why he was not making a trip with the tank wagon to Dr. Scarabrough's store.

Q. —. That is what you asked him?

A. Yes, sir.

Q. 70. So the Standard Oil Company does have tank cans to sell or send around and deliver oil in?

A. To the merchants, yes, sir; that is, these ten-gallon milk cans.

Q. 71. And not to other consumers?

A. Not to consumers.

Q. 72. This conversation with Reynolds was in the early part of 1904?

A. It was in the latter part of 1903.

Q. 73. What do you mean by the latter part?

A. I appointed him agent in October or November, 1903, and gave him directions about the delivery of oil to the various merchants in the territory.

Q. 74. Wasn't it the early part of January, 1904, you had this talk with him about Scarabrough?

A. No, sir.

Q. 75. Wasn't it, in fact, Mr. Carrico, after the newspapers had published some articles in regard to the matter of Holt giving away oil up here at Gallatin?

A. No, sir.

Q. 76. You hadn't heard of it?

A. No, sir.

Q. 77. You never heard that?

A. I never heard of it until in the latter part of 1904.

Q. 78. Since you have been notified you would be a witness in this case, you have examined the books to see when you checked out Mr. Reynolds, haven't you?

A. I would like to state, in answer to that previous question, 1904 or 1905.

Q. 80. Latter part of 1904, or early part of 1905?

A. Yes, sir. I don't remember the exact dates, for I was not particularly interested in that matter.

Q. 81. Now, answer my other question?

A. What is the question?

(Question read.)

A. No, sir.

392 Q. 82. You have not looked into that matter?

A. No, sir.

Q. 83. You have not been advised from the Louisville office when he was checked out?

A. No, sir.

Q. 84. Well, sir, what is your best impression about the time you checked him out?

A. It was in 1904, in January or February, or possibly the early part of March.

Q. 85. Now, I want to refresh your recollection, Mr. Carrico, by reading to you from the testimony of Mr. Reynolds, as follows: "Well he," meaning yourself, "drove in one day from—as well as I remember, I will not state positively, but he came from the section of the country, he might have driven in from Cadiz—but, at any rate, he came up between the rivers, and I think he had met the wagon, and he asked why it was we were not selling Dr. Scarabrough, and I said I didn't know; the tank wagon had never sold him since I handled the tank wagon; and he says, he is evidently selling the other oil, and he says, you have Fisher, the driver, get some tanks—five-gallons cans—and when he is down in that neighborhood deliver this oil to these parties free of charge, from the Standard Oil Company wagon, and charge it back to us." Didn't you and Mr. Reynolds have that conversation, in substance?

A. No, sir.

Q. 86. I will ask you further, if, at that time you did not have that conversation as detailed by Mr. Reynolds, or that conversation in substance, and you also said in substance, "We will try and see if we can not force him," meaning Dr. Scarabrough, "get him to take oil from the wagon?"

A. No, sir.

Q. 87. Now, Mr. Reynolds had a driver by the name of Fisher, didn't he?

A. I don't remember.

Q. 88. He did have a driver?

A. I don't remember, sir.

Q. 89. You know Mr. Reynolds didn't go out with the wagon himself, but sent Fisher out over the territory?

A. We had several sub-agents that went out with their wagons.

Q. 90. I didn't ask you that; but, in this instance, didn't Mr. Reynolds have a driver by the name of Fisher, who went out with his wagon on the route?

A. I don't remember.

Q. 91. You didn't tell Mr. Reynolds that you discharged him because of any delinquency on his part in attending to his duty?

A. No, sir.

393 Q. 92. Didn't tell him anything about it?

A. There was some correspondence from the Louisville office relative to his not visiting the merchants with the tank wagon, and he became a little indifferent, and, of course, his resignation followed.

Q. 93. Do you mean to say he resigned, or the company superseded him?

A. It was brought to that point.

Q. 94. He did not resign?

A. I don't remember specifically whether he resigned or not, but, anyway, I was instructed to go down and check in a new agent.

Q. 95. Now, after you had the conversation with Mr. Reynolds in regard to securing these milk cans, didn't you know that he went and consulted a lawyer?

A. I didn't know it.

Q. 96. About the substance of your conversation?

A. No, sir; I didn't know it.

Q. 97. He was in the livery business at that time, was he not?

A. Yes, sir.

Q. 98. And up to that time you had been taking his livery—getting your livery from him?

A. Yes, sir; I patronized him.

Q. 99. And after that you didn't patronize him?

A. I left the territory after that.

Q. 100. When did you leave the territory?

A. I was sent to Memphis, March 21st or 22d, 1904.

Q. 101. Oh, yes, but long before that Mr. Reynolds had ceased his connection with the company, in the latter part of January?

A. January or February.

Q. 102. Now, up to that time, you had not been sent to another territory?

A. I hardly get around to these points, some of them once a month, and some twice a year, and once a year.

Q. 103. Do you mean to say you never went over that territory again while Mr. Reynolds was agent, after you had talked to him about the cans?

A. I appointed a Mr. McCraw, or McGraw, who ran a livery stable at Bear Springs; therefore, I did my driving with him after that.

Q. 104. Then you did go over the territory some after you had this talk with him?

A. Not specifically, that I remember.

Q. 105. And, after you had the talk with him, you changed your livery business to another man?

A. Not that I remember specifically. As I say, I left the territory immediately afterwards, and I don't remember making another trip, though, if I had made this trip, I would have made it with Mr. McGraw, because he was our agent.

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Q. 106. Agent for what?

A. Sub-agent for the Standard Oil Company, successor to O. T. Reynolds.

Q. 107. I am not asking about what you did with Mr. Reynolds after he ceased to be agent?

A. You asked if I drove with him.

Q. 108. I want to know if it is not a fact, after you had the talk with him about securing cans in which to carry oil, if you didn't cease to have any transaction with him in the livery business during the further time that he was agent of the Standard Oil Company?

A. I don't catch what you mean, sir.

(Question read to witness.)

A. Oh, I don't remember.

Q. 109. Now, don't you know, as a matter of fact, Mr. Carrico, that, prior to the time you had the conversation with Mr. Reynolds about the cans, that Dr. Scarabrough, doing business at Tharp, had been purchasing oil from the Evansville Oil Company?

A. He stated to me that he had purchased, upon one or two occasions, from the Evansville Oil Company.

Q. 110. Now, after you had the talk with Mr. Carrico, about the cans, did you go back to see Mr. Scarabrough yourself?

A. We had no talk with Carrico about the cans.

Q. 111. With Mr. Reynolds, I mean?

A. Now, the question, please.

(Question read to witness.)

A. No, sir.

Q. 112. Never went to see him at all?

A. That one trip I made in 1903.

Q. 113. And never went back to see him until you saw him last week?

A. Never went back to see him until last week.

Q. 114. Who else was it you sent to him to give away oil?

A. What do you mean, sir.

Q. 115. Read the question, Mr. Duke.

(Question read to witness.)

A. I sent no one to him. Who do you mean by him?

Q. 116. Dr. Scarabrough?

A. I sent no one to Dr. Scarabrough to give away oil.

Q. 117. Who did you send in that territory to give away oil to that territory—to give away oil to Scarabrough's customers?

A. No, sir; no one.

Q. 118. Who was it went in that territory and gave away oil to Dr. Scarabrough's customers?

A. No one, to my knowledge, sir.

395 Redirect examination.

By Mr. VERTREES, for Defendant:

Q. 119. Did the company ever use or handle at any time, five-gallon milk cans?

A. Not to my knowledge, sir.

Q. 120. Does it now?

A. No, sir, not to my knowledge; not at any of their stations I know of, and I have worked from Indianapolis to New Orleans.

Further this deponent saith not.

C. I. CARRICO.

By ————,
Stenographer and Notary Public.

Exceptions of Complainant to Evidence. Filed November 20th, 1907. J. D. G. Morton, C. & M.

In the Chancery Court of Sumner County, Tennessee.

No. 237.

STATE OF TENNESSEE *ex Rel., etc.,*
versus
STANDARD OIL COMPANY.

Exceptions of complainant to testimony of the defendant as follows:

Exception No. 1. Complainant excepts to the testimony of J. E. Comer, to the effect that the daily reports made by Holt of his doings at Gallatin, in relation to securing the countermand of the orders of Love and others to the Evansville Oil Company, contain no statement that he had given any oil to any one to induce them to countermand any orders, and object to any testimony in relation to the contents of the written reports or letters of Holt in reference to that matter, because the originals were the best evidence, and were not shown to be lost or unintentionally mislaid.

The answer objected to is found on page 18 of Comer's testimony, and is responsive to a question on page 16.

Question by Mr. VERTREES:

"You have been asked about a letter that Holt wrote to you as to his visit up there, or the result. Did that letter make any statement as to having any oil to induce any one to countermand any orders?"

396 The next question is, in substance, the same, and the answer is as follows:

"None of the reports contained any such statement."

Then the next question is as follows:

"Or any of the letters?"

"None of the letters." (Comer's Testimony, Exhibit No. 3 to stipulation of council, pp. 16, 18.)

At the time Mr. Comer gave this testimony, he showed in the answer to the next question, after the question and answer last quoted, that the report or duplicate of it was in Nashville. (Comer's Testimony, p. 18.)

He also showed in his testimony (p. 11) that the report itself, at the time he gave his testimony, was in the Nashville office.

In relation to that matter, C. E. Holt, witness for defendant, tes-

tified, at the bottom of page 15, and at the top of page 16, of his testimony, as follows:

"Q. What were the requirements of the company as to reports of you as salesman of what you did?

"A. I was to make a complete report every day or pretty nearly everything I said.

"Q. What was the nature of these reports, in duplicate, or triplicate, or how?

"A. I made three copies, original, duplicate, and triplicate.

"Q. What did you do with these?

"A. Kept one myself, mailed one to Nashville, and one to Cincinnati.

"Q. Did you make a report of that character of your transactions at Gallatin; did you make a report?

"A. I made a report of countermanding the oil, but did not make any report of giving away oil."

Complainant objects to the answer last above quoted, for the reason that it is an attempt to prove by oral testimony the contents of a written instrument, which, in so far as the testimony shows, is still in existence. There is no pretense that the copy retained by Holt had been destroyed, and, while Collings, in his testimony (p. —), refers to the destruction of some papers, he does not pretend to know or say that the triplicate copy of the reports sent to him has been destroyed.

Court's ruling: Exception sustained.

The defendant excepts to the ruling of the Court in sustaining complainant's exception to the above evidence.

Exception No. 2. Complainant also objects to the following question of C. E. Holt, on page 39 of his testimony, wherein he attempts to state the contents of a written report above referred to, for the reasons above stated:

397 "While I could not recall exactly what I told him, but

I told him in my report just the same that I had secured the countermand of those orders all right, and I told him that I did it in the same line of argument like he told me to do, how to talk to them."

Court's ruling: Exception sustained.

The defendant excepts to the action of the Court in sustaining said exception of complainant to the above evidence.

Exception No. 3. Complainant also excepts to the testimony of C. T. Collings, in relation to the contents of the copy of Holt's report of his doings at Gallatin, which were sent to the Cincinnati office, because said report is the best evidence of its contents, and, further (Collings, testimony, p. 107), it appears that he never saw said report.

Court's ruling: Exception sustained.

To which action of the Court in sustaining complainant's said exception, the defendant excepts.

Exception No. 4: Complainant also excepts to the following ques-

tions and answers of said Collings' testimony (p. 106), because the answers are mere deductions or opinions of said Collings. The questions and answers are as follows:

"Q. If that report had stated that Mr. Holt had secured the countermand of those orders by gifts of the company's oil, would it have been laid on your desk?

"A. It certainly would, as that would have been a very unusual transaction.

"Q. Was any such transaction ever brought to your attention?

"A. It never was, and the report of Holt was never brought to my desk for the reason that there was not enough importance in it."

This last answer is also objectionable, because it attempted to state by inference the contents of said report.

Court's ruling: Overruled.

The complainant excepts to the action of the Court in overruling said exception to the above evidence.

Exception No. 5. Complainant also objects to the following answer of said Collings to the following question, found on page 107 of his testimony:

"The question is, at that time did you not recall to have seen Holt's report at all?"

That part of the answer objected to is as follows:

"Because I infer there was nothing of importance there in it. Therefore, it was not brought to my attention."

This part of the answer is objectionable because it is an attempt upon the part of Collings to state the contents of said report.

Court's ruling: Overruled.

398 The complainant excepts to the action on the Court in overruling its said exception to above evidence.

Exception No. 6. Complainant also objects to the following answers to questions put to witnesses for the defendant, S. P. Wilson, found on page 115 of his testimony:

"Q. Now, recurring to those daily reports—did any report that came in from Rutherford or Holt, the salesman, and you say they passed through your office?

"A. Yes, sir.

"Q. Did any of them contain any statement to the effect that those orders at Gallatin had been countermanded by gifts of oil, any of them?

"A. No, sir; the reports stated that certain orders had been countermanded, but there was no intimation in any of them that any gift had been made of money or oil."

These answers objectionable because they attempt to state the contents of a written instrument, a copy of which was in the possession of Holt, one in the possession of the Cincinnati office, and another in the possession of Comer, or the Nashville office.

In this connection it is proper to call the attention of the Court to the statement of Witness Wilson, on cross-examination, on page 119 of his testimony, that the papers and documents pertaining to

the Nashville office were in the office at Nashville when the witness left the employ of the company, in March, 1907.

Court's ruling: Exception sustained.

To which action of the Court sustaining said exception of complainant, defendant excepted.

Exception No. 7. Complainant further excepts to the testimony of Witness C. E. Holt, in relation to the alleged copy of the letter to him from J. E. Comer, and to said alleged copy, dated December 24th, 1903, and found on pages 55 and 56 of the volume containing the testimony of said Holt, because said letter purports to be taken from a copy copied into a transcript on file in the Supreme Court of Tennessee, and because it is an attempt to prove by oral testimony the contents of an alleged letter, when the original thereof had been given by Holt to J. E. Comer, special agent of defendant, and a letter press copy thereof was in the Nashville office of defendant, as shown by the testimony of said Collings, on pp. 45 and 46 of the volume containing his testimony.

Court's ruling: Exception sustained.

To which action of the Court sustaining said exception of complainant, the defendant excepted.

Exception No. 8. Complainant also excepts to the testimony of C. T. Collings, and the alleged copy of a letter claimed to 399 have been sent by him to J. E. Comer, under date of December 26th, 1903, and to said alleged copy, and found on page 74 of the volume containing said Collings' testimony, because the original of said letter is not produced or accounted for. It is claimed that said letter was sent to said Comer as special agent, and, therefore, it should be among the papers of defendant company at its Nashville office, and, moreover, said Collings (p. 73) only *thinks*, and does not know, that said copy is out of his own letter book.

Court's ruling: Sustained.

To which action of the Court sustaining said exception of complainant, the defendant excepted.

Exception No. 9. Complainant also objects to the testimony of the witness, Collings, in relation to the alleged copy of a letter from J. E. Comer, under date of December 26th, and to said alleged copy, set out on pages 76 to 79 of the volume containing the testimony of said Collings, because, while he says (p. 75) that he has been unable to find the original, said original is not satisfactorily accounted for, and the tissue copy produced and set out as aforesaid he has no personal knowledge of, but thinks that he got it from Nashville, and thinks it was furnished to him by Mr. Coons. (P. 75 of Collings' testimony.)

Court's ruling: Sustained.

To which said action of the Court in sustaining complainant's said exception, the defendant excepted.

Exception No. 10. Complainant also excepts to the testimony of C. T. Collings, in relation to an alleged letter under date of December 28th, 1903, and the alleged copy of said letter, claimed to have been written by him to J. E. Comer, and found on pages 80 and 81 of

the volume containing Collings' testimony, because the original of said letter is not produced, but said Collings shows, on page 78, that he sent the original of said letter to Comer, and he has no personal knowledge of the alleged tissue copy produced by him and copied into the record as above stated.

Court's ruling: Sustained.

The defendant excepted to the action of the Court sustaining complainant's foregoing exception.

Exception No. 11. Complainant further excepts to the testimony of John J. Vertrees, Esq., wherein he attempts to set out, on page 126 of the volume containing his testimony, the contents of Holt's written report, and of his doings at Gallatin, when he secured the countermand of the orders given by Love and others to the Evansville Oil Company, because in his cross-examination, Mr. Vertrees shows that he does not know whether the alleged copy shown to him was in the handwriting of Holt, or was, in fact, the report made by Holt, and because, further, as above shown, one of the triplicate
400 originals of said report was in the possession of Holt, another in the possession of the Cincinnati office, neither of these triplicates being shown to have been lost or unintentionally mislaid.

Court's ruling: Sustained.

To which action of the Court sustaining complainant's said exception, the defendant excepts.

W. A. GUILD,
R. L. PECK,

District Attorney-General.
CHARLES T. CATES, JR.,
Attorney-General.

It is ordered that the above be made a part of the bill of exceptions in the cause.

J. W. STOUR, *Chancellor.*

November 20, 1907.

STATE OF TENNESSEE, *Sumner County*:

Be it remembered that a Chancery Court begun and held in the courthouse, in the town of Gallatin, for the County and State aforesaid, on the first Monday in May, 1907, the same being the day fixed by act of the General Assembly of the State for the holding of the said Court, and the 6th of the month Court met, according to law, present and presiding the Hon. D. L. Lansden, Chancellor, etc., of the Fourth Chancery Division, sitting by interchange with the Hon. J. W. Stout, Chancellor, etc., of the Sixth Chancery Division, when the following proceedings were had and entered of record, to wit:

May Term, 15th Day, May, 1907.

Court met pursuant to adjournment, present and presiding the Hon. J. W. Stout, Chancellor.

STATE OF TENNESSEE, *ex Rel.* Attorney General
CHARLES T. CATES, JR., etc.

versus

STANDARD OIL COMPANY.

The demurrer of the defendant, Standard Oil Company, filed in this cause, coming on this day to be heard before Hon. J. W. Stout, Chancellor, the Court is of the opinion that the demurrer is not well taken, and overrules the same.

Wherefore, it is ordered and decreed that said demurrer is by the Court overruled.

401 The defendant is given until June 15th, 1907, to answer the bill.

The defendant excepts to the action of the Court overruling its demurrer filed in this cause.

May Term, 16th Day, May, 1907.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY.

In this cause it is stipulated and agreed by and between solicitors for complainant and defendant that notice to take depositions or for any other steps to be taken in the cause, shall be served on executed on William A. Guild, solicitor for complainant, and on James W. Blackmore, solicitor for defendant, and that notice served on said solicitors shall operate as notice to the respective parties as above stated; and that this agreement be made an order of the Court, and spread on minutes as such.

R. L. PECK,

Of Counsel for Complainant.

JAMES W. BLACKMORE,

Of Counsel for Defendant.

STATE OF TENNESSEE, *Sumner County:*

Be it remembered that at a Chancery Court begun and held in the courthouse in the town of Gallatin, for the County and State aforesaid, on the second Monday in November, 1907, the same being the day fixed by the act of the General Assembly of the State for the holding said Court, and the 11th of the month, Court met according to law, present and presiding the Honorable J. W. Stout, Chancellor of the Sixth Chancery Division, when the following proceedings were had and entered of record, to wit:

November Term, 14th Day, November, 1907.

STATE OF TENNESSEE *ex Rel.*

versus

STANDARD OIL COMPANY.

In this cause came the complainant, by her Attorney General, and presented to the Court, and asked permission to file an amended and supplemental bill, duly sworn to, and upon consideration
402 thereof, such permission is granted, and said amended and supplemental bill is ordered filed, and, accordingly, is filed.

Thereupon came the defendant, Standard Oil Company, by its attorneys, John J. Vertrees and James W. Blackmore, Esq., and, having entered its appearance, waiving the issuance of process and copy of bill, to said amended and supplemental bill filed a demurrer and answer thereto, it being understood that said demurrer should be first heard and disposed of.

And thereupon it is agreed that the proof heretofore taken and filed in this cause, including the several stipulations of counsel, may be read by either party, subject to exceptions and legal admissibility thereof, as evidence.

November Term, 20th Day of November, 1907.

No. 237.

STATE OF TENNESSEE *ex Rel.* etc.,

versus

STANDARD OIL COMPANY OF KENTUCKY.

Be it remembered that this cause came on to be heard on this the 20th day of November, 1907, upon the amended and supplemented bills filed herein, and the demurrer thereto incorporated in the answer of the defendant, Standard Oil Company, which, having argued by counsel, and considered by the Court, and the Court being of the opinion that the second ground of demurrer to said amended and supplemental bill is well taken, doth sustain the same, and doth overrule the other grounds of demurrer; thereupon the Court doth adjudge that said second ground of demurrer be sustained, and said amended and supplemental bill be dismissed. The cost of filing the same will be paid by complainant, State of Tennessee. To which action of the Court in sustaining said second ground of demurrer, and dismissing her amended and supplemental bill, the complainant, State of Tennessee, duly excepted; and to the action of the Court overruling all of the grounds of the demurrer except the second, defendant excepts.

Thereupon this cause came on to be further heard and determined upon the original bill and answer thereto, and the proof and stipulations on file in the cause. And it appearing to the Court that the allegations of the original bill are sustained by the proof, and that

the defendant, Standard Oil Company, and its agents, Comer, Holt, and Rutherford, and S. W. Love, W. H. Lane, J. E. Cron, and L. C.

403 Hunter, as alleged in said bill, unlawfully entered into an arrangement and agreement for the purpose, and with the view of lessening full and free competition in the sale of defendant company's oil at Gallatin, and that such unlawful agreements and arrangements tended to, and resulted in, lessening and destroying full and free competition in the sale of defendant company's oil at Gallatin, and tended to, and resulted in, advancing the price of said oil to defendant's customers oil at Gallatin, all as set out in the original bill; and it further appearing that defendant, Standard Oil Company, in entering into said unlawful agreements and arrangements, violated the provisions of section 1 of chapter 140 of the Acts of 1903, and subjected itself to the penalty prescribed by section 2 of said act, applying to foreign corporations violating its provisions, it is accordingly so ordered, adjudged and decreed; thereupon, the Court doth order, adjudge and decree that the defendant, Standard Oil Company, a foreign corporation, chartered and organized under the laws of the State of Kentucky, be, and hereby is, denied the right to do so, and prohibited from doing business within this State, and its license, or permit, to do business within this State, issued on the 21st day of September, 1893, by the Secretary of State of this State, be, and hereby is, cancelled and annulled, and said defendant, Standard Oil Company, its managers, agents, servants, and attorneys, are hereby perpetually enjoined and restrained from doing or carrying on business within this State; but nothing herein shall be construed to in any way affect or apply to defendant's interstate commerce, or to prohibit it from engaging in interstate commerce within this State.

To that part of the foregoing decree sustaining defendant's second ground of demurrer to her amended and supplemental bill, and dismissing the same, complainant, the State of Tennessee, prays, and is granted, an appeal to the next term of the Supreme Court, at Nashville, Tennessee.

And the defendant, the Standard Oil Company, prays an appeal from all of the foregoing decree, except that part of the decree sustaining the second ground of the demurrer to the supplemental bill, to the next term of the Supreme Court of Tennessee, sitting at Nashville, which is granted upon its executing bond, with security, conditioned as required by law, in the penal sum of \$500, which, having been given, with J. J. Vertrees, security, said appeal is granted.

The exceptions to the evidence hereinbefore filed in the cause, together with the rulings of the Court thereon, are hereby made a part of the record, as though formally incorporated in a bill of exceptions.

Appeal Bond.

STATE OF TENNESSEE *ex Rel.*
versus
 STANDARD OIL COMPANY.

Filed November 20th, 1907. J. D. G. Morton, C. & M.

We, the Standard Oil Company, of Kentucky, and J. J. Vertrees, its security, acknowledge ourselves indebted to State of Tennessee in the sum of five hundred dollars, to be conditioned that the said Standard Oil Company, of Kentucky, shall successfully prosecute an appeal to the next term of the Supreme Court of Tennessee, at Nashville, Tenn., by it prayed from a judgment rendered against it in favor of *of* the said State of Tennessee, in the Chancery Court of Sumner County, on the 20th day of November, 1907, for the sum of costs of suit; or, in case of failure to do so, pay and satisfy said debt and damages and costs, and perform and satisfy the judgment of the Supreme Court in the premises.

STANDARD OIL COMPANY OF KENTUCKY,
 By JAMES W. BLACKMORE, *Attorney.*
 J. J. VERTREES, *Security.*
 By JAMES W. BLACKMORE.

Bill of Costs.

State Tax. County Tax.

J. D. G. Morton, Clerk and Master, receiving and filing bill, 25c; affidavit to bill, 25c; filing affidavit to bill, 25c; spa. to answer, 75c; copy bill, \$3.00; filing demurrer, 25c; filing answer, 25c; filing amended bill, 25c; filing answer, 25c; filing bill of exceptions, 25c; six depositions, \$6.00; filing nineteen depositions, \$1.90; filing four stipulations, \$1.00; filing eleven exhibits, \$2.75; filing complainant's exceptions to evidence, 25c; forty-four rules, \$4.40; three orders, \$1.50; decree, \$1.00; six dockets, 60c; filing and receiving appeal bond, 50c; security, 25c; cost and entry, 50c; transcript, 250,000 words, \$250.00; postage on record, \$2.00; binding, \$5.00; seal and certificate, \$5.00; total, \$283.90.

Buford Duke, Notary Public, thirteen deposition-, \$13.00; F. E. Patton, Sheriff, ex. sp. to answer, \$1.00; O. T. Reynolds, complainant's witness, 1 day, 150 miles, \$9.00; total bill of costs, \$306.90.

405 STATE OF TENNESSEE, *Sumner County:*

I, J. D. G. Morton, Clerk and Master of the Chancery Court at Gallatin, Tennessee, do hereby certify that the within volumes 1 and 2, *is* a true and perfect transcript of the record and bill of costs now on file in my office at Gallatin, in the case of *State of Tennessee, ex rel., vs. Standard Oil Company.*

Witness my hand and the seal of this said Chancery Court, at Gallatin, this November 26th, A. D. 1907.

J. D. G. MORTON,
Clerk and Master.

406 In the Supreme Court of Tennessee, at Nashville, December Term, 1907.

STATE OF TENNESSEE *ex Rel.* ATTORNEY-GENERAL

vs.

STANDARD OIL CO. OF KENTUCKY.

Appeal from the Chancery Court of Sumner County, Tennessee.

Violation of Anti-Trust Act of 1903.

*Brief and Argument of John J. Vertrees, William O. Vertrees,
Counsel for Defendant.*

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ACTS 1903, CHAPTER 140.

That from and after the passage of this Act all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are hereby to be against public policy, unlawful, and void.

SEC. 2. Be it further enacted, That any corporation chartered under the laws of the State which shall violate any of the provisions of this Act shall thereby forfeit its charter and its franchise and its corporate existence shall thereupon cease and determine. Every foreign corporation which shall violate any of the provisions of this Act is hereby denied the right to do, and is prohibited from doing business in this State. It is hereby made the duty of the Attorney-General of this State to enforce these provisions by due process of law.

SEC. 3. Be it further enacted, That any violation of the provisions of this Act shall be deemed, and is hereby declared to be destructive of full and free competition and a conspiracy against trade, 408 and any person or persons who may engage in any such conspiracy or who shall, as principal, manager, director, or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders made in furtherance of such conspiracy, shall, upon conviction, be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one year nor more than ten years; or, in the judgment of the Court, by either such fine or imprisonment.

SEC. 4. Be it further enacted, That any person or persons or corporation that may be injured or damaged by any such arrangement, contract, agreement, trust, or combination, described in section 1 of this Act, may sue for and recover in any court of competent jurisdiction in this State of any person or persons or corporation operating such trusts or combination, the full consideration or sum paid by him or them of any goods, wares, merchandise or articles, the sale of which is controlled by such combination or trust.

SEC. 5. Be it further enacted, That it shall be the duty of the Judge of the Circuit and Criminal Courts of this State specially to instruct grand juries as to the provisions of this Act.

The transaction complained of in the *original* bill took place at Gallatin, Tennessee, October 12, 1903, but the bill was not filed until March 16, 1907, or about three and one-half years after the alleged offense had been committed. The transaction is the 409 same one for which this Court adjudged C. E. Holt, a salesman of the defendant Company, guilty of violating the Anti-Trust Act, in the case which is reported as *Standard Oil Co. v. State*, 9 Cates, 618.

On the 14th day of November, 1907, an *amended* bill was filed, complaining that the Company had also violated the act through a certain contract which it had made (in Ohio) with the Cassetty Oil Company of Nashville, Tennessee. This contract was made on the 30th day of October, 1889, and expired on the 30th day of October, 1904, but the amended bill was not filed until the 14th day of November, 1907, or more than eight years after the contract was made, and more than three years after it had expired.

These are the *only* transactions complained of, although the Company has been doing business throughout Tennessee for more than *twenty years*.

The Chancellor dismissed the amended bill on demurrer, and predicated his decree alone on the transaction at Gallatin, Tennessee.

Before stating the facts of the particular transactions complained of, it is proper to state the circumstances of the situation at that time.

History of the Company and its Operations in Tennessee.

The defendant Company was organized under the laws of
410 *Kentucky*, in 1886. It has power to deal in naval stores, and to manufacture, refine and deal in the products of petroleum. The majority of its stock is held by the Standard Oil Company of New Jersey. Its principal business in Tennessee is as a *dealer* in coal oil.

The Company has built up a great business in Kentucky, Tennessee, Mississippi, Louisiana, Alabama, Georgia and Florida.¹ The Company has done business in Tennessee for many years. While doing business here, the act requiring foreign corporations to file copies of their charters with the Secretary of State was passed; and the Company filed a copy of its charter September 21, 1893.

The Company has been a success. That success in a great measure is due to its *system of doing business*—the system of *tank* distribution and delivery. Its oil is transported in *bulk* from the refineries in iron tank cars, to the Company's "bulk stations." These are stations established on railway lines in the cities and principal towns, and at which the Company has stationary iron tanks, into which the oil is transferred *in bulk*, from the tank cars, without expense, by gravity. "Tank wagons" are kept at these "bulk stations" to distribute the oil to the Company's customers. These tank wagons are iron tanks permanently mounted on wagons, and they go out into the country from the stations as far as *twenty-five miles*.²

411 In some parts of the country the roads get bad in wet weather, rendering it impossible for the heavy tank wagons to go out. The Company under such conditions sends out oil in ten-gallon (milk) cans, by ordinary light vehicles, so as to supply its trade.³

¹ Trans., 351. All references in this brief are to the printed record, and all italics herein, unless otherwise shown, are ours.

² Trans., q. 115, p. 282.

³ The tank wagons are heavy, weighing from 1,700 to 3,200 pounds, according to the size.[†]

[†] Trans., 388.

That part of the country in which the Company does business is divided up into "districts" under the immediate control of agents, known as "special agents." Sub-agents are in charge of the bulk stations, and they are known as "local agents." In 1903, the special agent in charge of Middle Tennessee was Mr. C. E. Comer, with his office at Nashville. The local agent at Gallatin was O'Donnell Rutherford, and Gallatin was in the Nashville district.

"Drivers" have charge of the tank wagons and deliver oil therefrom to customers. "Inspectors" and traveling "salesmen" go over the districts from time to time. Mr. C. E. Holt was a traveling salesman in the Nashville district, with headquarters at Nashville.

No oil is sold from the wagons to consumers. They sell and deliver to merchants and dealers only.⁴

The Company has bulk stations in forty-nine counties in Tennessee. Seventy-nine tank wagons operate from these stations as bases of supplies.⁵

412 The Company also has seven "barrel stations" in Tennessee—that is, stations from which oil is sent out in barrels only.⁶

Its stations have cost \$166,000. Its teams, tank wagons, etc., are worth \$30,000. It pays annually as license fees and taxes over \$10,000, and it pays inspection fees amounting to about \$40,000 per annum.⁷

This system was not built up in a day, nor in a year, but through years. Its advantages are obvious. The merchant can get oil when he wants it, and as he wants it. There are no long "delays" in shipments. The small merchant is not obliged to order a carload, nor to "club" with others (even when he can) in order to get the advantage of carload lots. The Company will deliver any quantity from 20 gallons up, as desired. The oil is delivered at the merchant's door, and measured before his eyes. This means full measure. There is no leakage and evaporation, as is the case when barrels are used; no loss in shipment, no leakage while stored. There are no drayage and cartage charges.⁸ The system is one that, by reason of its convenience, "absorbs the business" (McIlwaine, q. 50, p. 201).

This thoroughly organized system gives the defendant Company an advantage over its competitors. They now appreciate it, and have begun to adopt the same system themselves. Some of 413 them have introduced the bulk-station and tank-wagon system into the four cities of Tennessee, but have not yet extended it to the towns.⁹

The price of oil has varied of course, but under the Company's system, prices have been gradually and steadily reduced.

Tables showing the price of oil at all times from January 1, 1903, to July 6, 1907 (when the tables were made out), at fifty-six of the

⁴ Trans., p. 217.

⁵ Trans., p. 218.

⁶ Trans., p. 219.

⁷ Trans., p. 220.

⁸ Trans., pp. 220, 221.

⁹ Trans., p. 220.

principal cities and towns of Tennessee, are in the record, and they show how prices have been reduced, and this, too, in a State in which it is *charged* that the Company had "pre-empted" the oil market, and at many places where the company has had no competition for years.¹⁰

The prices of oil, delivered from tank wagons, at Gallatin (where the "conspiracy" existed) have been as follows:

*Gallatin Tank-Wagon Delivery.*¹¹

1903, January 1	14½ cents per gallon.
1903, April 28	14 cents per gallon.
1903, June 5	13½ cents per gallon.
1903, October 27	14½ cents per gallon.
1904, March 8	14 cents per gallon.
1904, May 24	13½ cents per gallon.

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1905, January 17	13 cents per gallon.
1905, February 22	12½ cents per gallon.
1905, April 24	12 cents per gallon.
1906, June 15	11½ cents per gallon.
1906, August 18	11 cents per gallon.
1907, July 5	11 cents per gallon.

The dates above given are the dates at which changes in price took place. The prices remained the same between dates as fixed at the last preceding date.¹²

It is proper now to pass for a moment from the Standard Oil Company to another company—the Evansville Oil Company of Evansville, Indiana.¹³ It sent its traveling salesman to Gallatin, and on the 5th day of October, 1903, he took orders for oil for future delivery from several merchants there.

On the 12th day of that October, Mr. Holt, a traveling salesman of the Standard Oil Company, by gifts of oil, induced four of those merchants to countermand the orders they had given Mr. Roseman; and *this* is the transaction upon which the original bill is based.

415 The Evansville Oil Company is an "independent" company. "Independent," "Home," "Citizens," and "People's" are favorite names to conjure with. This "Independent" Evansville Oil Company is a member of two combinations, known as the "United States Pipe Line," and the "Pure Oil Co."

This combination has parceled out and divided up the United States among its members into districts, under an agreement which

¹⁰ Love, p. 51. Lane, p. 57.

¹¹ Trans., pp. 246, 253, 264, 269.

¹² Trans., q. 148, p. 225.

¹³ It was this company that inaugurated this war on the Standard Oil Company, and employed counsel to assist in the prosecution of that Company and its agent, Holt. (Honeywell, Trans., q. 133, p. 140.)

enables the particular company which operates in any given district to have it all to itself—to “preempt” it. *The others cannot enter there.* Mr. Honeywell, the representative of the Evansville Oil Company, had to admit this, under cross-examination on the stand.¹⁴

Under the apportionment of this trust, Gallatin fell to the Evansville Oil Co. In October, 1903, for the first time it sent over its salesman, Mr. Roseman, to do some business there. He solicited orders for future delivery in barrels, at 14½ cents per gallon. He represented his oil to be superior to that of the defendant Company,¹⁵ and presumably was voluble as to “independents” and “monopoly.”

His visit was opportune. It had happened that *one* car-tank of indifferent oil had been received at Gallatin about a month before by the Standard Oil Co.,¹⁶ and as one merchant expresses it, consumers were “kicking” about the oil.¹⁷ From the complaints, the oil does not seem to have been quite as good as usual. It was one of those things that happens. The oil got better again when they got rid of that tank.¹⁸

And, in truth, the ground of complaint was more imaginary than real.

Mr. Lane, a merchant of Gallatin, states that a customer of his was so dissatisfied with a can of oil he (Lane) sold to him, that he returned it and had him (Lane) to go to another merchant and have his can filled. The oil was the same Standard Oil Company oil, but the customer was pleased with it and directed Mr. Lane to send him that merchant's oil thereafter. Instead of doing so, Lane (keeping it to himself) supplied him with the same kind of oil he had sold to him in the first instance, *and no complaint was ever made against the oil.*¹⁹

Mr. Cron, another merchant, testifies that some of his customers complained, but that he used the oil at his home all the time, and he and his family saw nothing wrong with it.²⁰ No witness, except the representative of the Evansville Oil Company, says the oil was really bad.

But that was the situation when Roseman came over to Gallatin from Evansville, and so on the 5th day of October, 1903, he placed orders with various merchants for *sixty-two* barrels in the aggregate. The oil was to be shipped from Oil City, Pennsylvania, and to be delivered at Gallatin “about” November 1, 1903.²¹

Among the orders so taken were these:

¹⁴ Trans., q. 202, p. 146.

¹⁵ Trans., p. 91.

¹⁶ Trans., q. 163-5, p. 53; q. 64, p. 60; q. 114, p. 64.

¹⁷ Trans., pp. 90, 91.

¹⁸ Trans., q. 166, p. 54; q. 193, p. 66; q. 152, p. 67.

¹⁹ Trans., qq. 71-75, p. 61.

²⁰ Trans., q. 47, p. 78.

²¹ Trans., q. 27, p. 58; q. 168, p. 142; q. 22, p. 115.

	Bbls.
S. W. Love	10
J. E. Cron	10
L. C. Hunter	5
W. H. Lane	5
Total	30

Mr. Comer, the special agent of the Standard Oil Company at Nashville, heard of this visit within a few days thereafter, and he immediately instructed Mr. Holt, his traveling salesman (who was then at Monterey), to go to Gallatin and look after, and hold his trade.²² In order to reach Gallatin, it was necessary for Mr. Holt to go by way of Nashville; so he returned to Nashville, and saw Mr. Comer in person. Mr. Comer told him to go to Gallatin and see if Roseman had taken any orders, and if he had, to get the merchants to countermand them.²³

He did not direct Holt to secure a countermand by *gifts* of oil. He never did that at all. Mr. Comer says he did not, and Mr. Holt says he did not, and nobody pretends to say that he did.

418 Neither Mr. Comer nor Mr. Holt had ever given any one oil to countermand an order in his life. Mr. Comer had never authorized such a thing to be done. It never had been done in Tennessee by any agent of the Company before, and it was against the standing orders of the Company for such a thing to be done. It was wholly foreign to its policy. It therefore never entered Mr. Comer's head that Mr. Holt would make gifts of oil. Mr. Comer's evidence is that which he gave on the trial of the criminal case in 1904. He died on the 14th day of October, 1906, *before* this bill was filed, and therefore his deposition may not be as explicit as it would have been as to *these* issues had he lived to give his deposition.

It never entered Mr. Holt's head to give oil until he discovered the orders could be countermanded in no other way; and then, in the zeal of the occasion, he did it.²⁴

And just here, before stating what happened when Mr. Holt arrived at Gallatin, a word should be said as to the countermanding of orders given to a competitor. It is not a high-minded course to pursue. It is not fair trade, *but they all do it*. It appears to be a recognized usage of trade that a merchant who gives an order for oil may countermand it *at will*, at any time *before* it is shipped. All agree as to this.²⁵ It is frequently practiced by the competitors of the Standard Oil Company on it.²⁶

419 The countermanding orders were accepted: that is, assented to by the Evansville Oil Company.²⁷ And although a car-

²² Holt, Trans., p. 316; Comer, Trans., pp. 280, 290.

²³ Trans., 317, 321.

²⁴ Trans., p. 321.

²⁵ Mr. Coons, qq. 195-198, p. 229; Mr. Collings, p. 352; Mr. Lane, qq. 44-47, p. 59; Mr. Love, qq. 17-19, p. 44; L. C. Hunter, p. 92; J. E. Comer, p. 287; Mr. Cron, q. 8, p. 75.

²⁶ Coons, qq. 195-198, p. 229; Collings, p. 352.

²⁷ Trans., q. 127, p. 123.

load of oil was shipped in to Gallatin, neither Love, Lane nor Cron was ever asked by the Evansville Oil Company to take any of the oil.²⁸ This conclusively shows that the usage was well known, and recognized by the Evansville Oil Company.

These countermands which Mr. Holt induced were made on the 12th day of October, 1903. The oil was to be shipped from Oil City, Pennsylvania, as above stated, and to be delivered "about" November 1, 1903,²⁹ or at least nineteen days after the date of countermand. Mr. Honeywell was asked if the oil had been shipped out, and he answered that it had been "ordered" shipped—clearly showing that it had not been shipped out at all,³⁰ but that orders merely had been sent from Evansville, Indiana, to Oil City, Pennsylvania, for it to be shipped in due time. Roseman delivered the orders for oil he had taken at Gallatin to the Evansville Oil Company *in person* at Evansville, October 8,³¹ and all at the same time.³²

The order for the oil to be shipped from Oil City, Pennsylvania, to Gallatin could not have been given prior to October 8, as that is the day it was received at the home office.³³

Mr. Honeywell says it could have been delivered at Evansville in ten days,³⁴ and at Gallatin in "two or three weeks."³⁵ It was not delivered at Gallatin until the 3d or 4th of November,³⁶ or twenty-three days after the countermanding orders were received.³⁷

Mr. Holt went to Gallatin to hold his trade, and if orders had been given to Roseman, to have them countermanded, if he could, by any sort of argument, or persuasion. He had no other thought or expectation at the time.³⁸ Nor did any one else.³⁹ Holt did not go at once upon his arrival at Gallatin to the local agent, Mr. Rutherford, but to merchant Lane, a regular customer of his.⁴⁰ He found that Mr. Love had given an order for ten barrels of oil. He set about to persuade him to countermand the order, but without success. He remarked that he would rather give 100 gallons of oil than to have that order stand.⁴¹ It was soon agreed upon, and Holt made out and Love signed, and Holt sent, the following telegram to the Evansville Oil Company, Evansville, Indiana:

"Kindly countermand my order for ten barrels of oil. S. W. Love."⁴²

Before Mr. Holt got back from the telegraph office, where he had gone to send the telegram, and could get around to the other merchants, it seems they had heard that Love had been *given* oil to

²⁸ Trans., q. 47, p. 45; q. 48, p. 46; q. 86, p. 62; q. 59, p. 78.

²⁹ Trans., q. 27, p. 58; q. 22, p. 115; q. 168, p. 142.

³⁰ Trans., q. 22, p. 131.

³¹ Trans., qq. 30-32, p. 115.

³² Trans., q. 19, p. 131.

³³ Trans., q. 168, p. 142.

³⁴ Trans., q. 161, p. 142.

³⁵ Trans., q. 167, p. 142.

³⁶ Trans., q. 152, p. 125.

³⁷ The telegrams were sent in October 12, 1903.

³⁸ Trans., p. 321.

³⁹ Comer, pp. 289, 290.

⁴⁰ Trans., p. 317.

⁴¹ Trans., pp. 317-332.

⁴² Trans., p. 45.

countermand his orders, and so they would not listen to *argument*, but wanted *oil*, and similar arrangements were made with Hunter, Cron and Lane.⁴³

Mr. Holt was informed that Lane had not given an order for oil. It was at this stage of the proceedings, and late in the evening of October 12, 1903, that Holt met Rutherford, the local agent, and informed him of what he had done.⁴⁴ Rutherford told him that Lane had given an order to Roseman, and Holt sent Rutherford to see Lane. They came to term- in writing as follows:

"October 12, 1903.—This is to guarantee that *I* will give *you* fifty gallons of oil free in consideration that *I* cancel *my* order given Evansville Oil Company. O. D. Rutherford, Standard Oil Company."⁴⁵

Of course this was meant to say that Cron's order should be cancelled.

The result of the day's operation was that Love, Lane, Cron
422 and Hunter were induced to countermand their orders for the thirty barrels of oil ordered by them, by gifts of 300 gallons of oil, in the aggregate. All of them signed countermanding telegrams, which Holt took and sent off to Evansville that day.

It will be perceived that Rutherford had nothing whatever to do with the agreements with Cron, Love and Hunter, and that Lane, Love, Hunter and Cron, the merchants, had nothing whatever to do with each other. The agreements were separate and in no way connected.

The only agreement as to the time of delivery was that it was to be delivered by the tank wagon *whenever wanted*.⁴⁶

Whether the next day or the next week or the next month was not stated.⁴⁷

Another thing is to be noted, and that is that it was *not* agreed that the oil was to be delivered out of oil *then* stored in the Company's tanks at Gallatin. All four of the merchants testify, and so does Mr. Holt, that the oil which the Company then had stored at Gallatin was not in mind, and that *they did not know whether the Company had any there then or not*.⁴⁸ And they also testify

that they did not make these agreements with Mr. Holt to
423 suppress competition, or to destroy competition in the sale of the oil the Company *then* had stored at Gallatin; that such a thing was never in their minds.⁴⁹

But when the thing had been done, these young men, Holt and Rutherford, began to *think* about it, for they realized that they had done something forbidden, and which the Company would not ap-

⁴³ Trans., p. 318.

⁴⁴ Trans., p. 319.

⁴⁵ Trans., p. 331.

⁴⁶ Holt, p. 320; Love, qq. 76, 77, p. 47; Lane, q. 54, p. 60; Hunter, p. 91; Cron, q. 81, p. 80.

⁴⁷ *Ib.*

⁴⁸ Love, qq. 71-75, p. 47; qq. 167-170, p. 54; Love, qq. 92-96, p. 63; q. 228, p. 72; q. 218, p. 71; q. 144, p. 66; Cron, q. 93, p. 81; q. 157, p. 85; Hunter, q. 43, p. 92; q. 67, p. 94.

⁴⁹ Love, q. 54, p. 60; qq. 79, 80, p. 62; Cron, pp. 80, 81, q. 90, p. 81; Hunter, qq. 38-40, p. 92; Love, q. 55, p. 46; Holt, p. 342.

prove. So Mr. Holt told Mr. Rutherford to deliver the oil whenever the four merchants wanted it, *but not to report it to Nashville*; that he would be back again before long, and would pay for it himself.⁵⁰ To this Rutherford agreed, but replied that he would have to report his "inches" when he made his monthly report.⁵¹

Mr. Holt wrote to Mr. Comer that day, informing him that he had succeeded in countermanding four of Roseman's orders. A duplicate copy of that same letter or report was sent by him, according to the course of business, to the Louisville office. Mr. Collings, the principal officer, was then located at Louisville, but now he has his office at Covington, Kentucky.

424 That letter is lost, and exceptions to proof of its contents were made and sustained. They will be noticed later. It is sufficient to say now that it did not reveal or intimate that the countermands had been secured through gifts of the Company's oil.

Mr. Rutherford's report of sales for October said nothing about the 300 gallons of oil, but he made a true report of the "inches" of oil in the tanks for November.⁵² The office at Nashville detected the discrepancy and wrote to Mr. Rutherford, calling his attention to it, and asking for an explanation.⁵³ Mr. Comer withheld his salary, or monthly commissions, pending that report.⁵⁴

Mr. Rutherford, of course, knew why there was a discrepancy, but presuming that Holt would come around and pay for the oil as promised, made no explanation. A number of letters,⁵⁵ calling for an explanation, was sent to him after his November report, but still he made none.⁵⁶

Orders for thirty-two of the sixty-four barrels Roseman had sold were not countermanded, and so the oil was shipped to Gallatin, November 3d or 4th, 1903.⁵⁷ It is to be remarked that the countermanding telegrams were not peremptory on their face, for
425 they said "*kindly countermand*," etc., and there was room for the Evansville Oil Company to have demurred, and to have asked "Why." But it did not. It never insisted that the oil should be taken. It accepted the countermands as accomplished facts, as they were.⁵⁸ Mr. Honeywell not only shipped the sixty-two barrels for which Roseman had taken the orders, but he shipped seventy-two barrels and two drums of gasoline, or *ten barrels of oil and two drums of gasoline for which he had no orders at all*.⁵⁹ This, of course, made the Evansville Oil Company liable absolutely for State and county taxes. The Standard Oil Company's agent notified the County Clerk of Sumner County to the end that he might enforce

⁵⁰ Rutherford, pp. 309, 303; Holt, pp. 3, 19, 20.

⁵¹ The Company requires reports of sales to be made, and it also requires the local agent to report how many inches of oil stand in the storage tanks. The two reports ought to substantially agree.

⁵² Trans., pp. 303, 304, 308.

⁵³ Trans., p. 304.

⁵⁴ Trans., p. 304.

⁵⁵ Trans., 375.

⁵⁶ Trans., 308, 309.

⁵⁷ Trans., q. 152, p. 125.

⁵⁸ Roseman, Trans., q. 127, p. 123.

⁵⁹ Trans., qq. 156, 157, p. 125; q. 169, p. 126; q. 158, p. 125.

their taxes against its competitor. The agent of the Standard Oil Company assumed that "independents" and "monopolists" should be required to pay alike. While this action is remarked upon in *Standard Oil Co. v. State*, 9 Cates, 635, it is respectfully submitted that, in view of the fact that the State employs back tax attorneys to compel those to pay who are escaping, and that every one in business ought to be made to pay the taxes imposed by law, the Standard Oil Company ought not to be censured by the law for this.

The County Court Clerk demanded the taxes, but the representative of the Evansville Oil Company denied liability on the ground that the Company was merely delivering oil sold upon interstate orders. He denied that he had a single barrel for which he did not have an order, and persistently asserted that every barrel had been sold,⁶⁰ *knowing that this was false*, and knowing that he had ten barrels of oil and two drums of gasoline for which he never had even the pretense of an order at all.⁶¹ This does not exculpate the Standard Oil Company, if it be guilty; but it shows that the character of the competition it encountered was as unscrupulous as it could be.

This brings us to a "few days" before Christmas, or about the 22d or 23d day of December, 1903.⁶²

Mr. James Whiteside, a citizen of Gallatin, had been the defendant's local agent at Gallatin for years, and until about May, 1901, when, upon the recommendation of Mr. Whiteside, young O'Donnell Rutherford was made local agent there.⁶³

During the years that Mr. Whiteside was agent, Mr. S. P. Wilson had been first assistant to Mr. Comer at Nashville, and he and Mr. Whiteside were well acquainted. A "few days" before Christmas, 1903, say about December 23, Mr. Whiteside, being in Nashville, chanced to meet Mr. Wilson at the railway station, and inquired how

his young friend Rutherford was doing as agent.⁶⁴ Wilson informed him that his management was not satisfactory, and that he was "short" in his "inches."⁶⁵ Thereupon, Mr. Whiteside remarked that he could probably explain the matter, and he then told Wilson about these transactions at Gallatin in October, and the gifts of oil. This was Mr. Wilson's first knowledge.⁶⁶ He promptly condemned it,⁶⁷ and went at once to the office and informed Mr. Comer what Mr. Whiteside had said,⁶⁸ and immediately, in his presence, Mr. Comer put in the telephone exchange a long-distance call for Mr. Rutherford at Gallatin.⁶⁹ He also requested Mr. Whiteside, who was returning to Gallatin, to tell Rutherford to come down to Nashville and to bring the newspapers with him.⁷⁰

⁶⁰ Trans., q. 27, p. 103; q. 34, p. 104; qq. 35, 36, p. 105.

⁶¹ Trans., q. 169, p. 126; qq. 156-158, p. 125.

⁶² Trans., Wilson, p. 375; Whiteside, q. 18, p. 297; Rutherford, p. 305.

⁶³ Trans., q. 17, p. 297.

⁶⁴ Trans., q. 17, p. 29.

⁶⁵ Trans., q. 17, p. 297.

⁶⁶ Trans., p. 375.

⁶⁷ Trans., q. 17, p. 297.

⁶⁸ Trans., p. 375.

⁶⁹ Trans., p. 375.

⁷⁰ Whiteside, Trans., p. 295.

Mr. Rutherford is dead, and his deposition could not be taken; but the evidence he gave on his trial at Gallatin, in 1904, is in the record. He was not, of course, examined as to many details which are spoken of here, but he says that he had a conversation at this time over the telephone with Mr. Comer, and asked him to send him his salary or commissions, and that Mr. Comer told him that when he explained his shortage in his "inches" he would, and that he went down to Nashville the next day, the 24th, and then told Mr. Comer all about it.⁷¹

428 He and Mr. Comer both testify that Mr. Comer reprimanded him and took the price of the 300 gallons of oil out of his salary.⁷²

So the undisputed facts are these: Rutherford and Holt agreed to conceal this matter, and did so.⁷³

Rutherford did not report the delivery of the gift of oil, which was delivered in October, in his report for that month,⁷⁴ but he did make a true report of his inches in his November report.⁷⁵ When that report came in, December 6th or 7th,⁷⁶ the Nashville office promptly called his attention to the shortage and asked an explanation.⁷⁷ Mr. Rutherford failed to reply.⁷⁸ A number of letters were then written to him upon the subject by Mr. Wilson, of the Nashville office.⁷⁹ As he was still silent, the Company withheld his commissions of salary for that month, awaiting his explanation.⁸⁰

December 8, 1903, Rutherford told Roseman, the agent of the Evansville Oil Company, all about it.⁸¹ December 22, 1903, Mr.

429 Whiteside, who lived at Gallatin, and was formerly an agent of the Company there, and who had recommended Mr. Rutherford to take his place, met Mr. Wilson, the first assistant at Nashville, and knowing these facts, for Rutherford had told them to him also,⁸² asked Wilson how Mr. Rutherford was getting along as agent.⁸³ Mr. Wilson told him that his agency was not satisfactory, and that he was short in his "inches."⁸⁴ Thereupon, Mr. Whiteside informed him that he could explain it, and he did so, telling Wilson all about the gifts of oil.⁸⁵ This was Wilson's first knowledge of the fact.⁸⁶ He also told Wilson that it was in the newspapers. Thereupon Mr. Wilson requested Mr. Whiteside, when he got home, to tell Rutherford to come to Nashville, and also to bring copies of the newspapers with him.⁸⁷ Wilson went immediately to the office of

⁷¹ Trans., pp. 304, 305.

⁷² Trans., pp. 305, 286.

⁷³ Trans., pp. 304, 309, 319, 320.

⁷⁴ Trans., pp. 303, 304, 308.

⁷⁵ Rutherford, pp. 303, 304, 309.

⁷⁶ Trans., p. 304.

⁷⁷ Rutherford, p. 304.

⁷⁸ Trans., p. 304.

⁷⁹ Trans., p. 375.

⁸⁰ Trans., p. 304.

⁸¹ Roseman, p. 126.

⁸² Trans., pp. 305, 297.

⁸³ Trans., 297.

⁸⁴ Wilson, p. 375; Whiteside, p. 297.

⁸⁵ Trans., 297, 375.

⁸⁶ Trans., 375.

⁸⁷ Whiteside, 297.

the Company and informed Mr. Comer of what Whiteside had told him.⁸⁸ Comer at once put in a call for a long-distance telephone for Rutherford at Gallatin.⁸⁹ Mr. Comer is dead, but Rutherford admits that he had a conversation that day over the telephone with Mr. Comer, and says it was one in which he sought to get his commissions paid, and admits that Comer refused to pay until he explained, and that he said he would come down the next day.⁹⁰ He
 430 did come down to Nashville the next day, the 24th of December, and told Comer all—bringing one of the Gallatin newspapers with him.⁹¹ Mr. Comer immediately condemned the act and deducted the price of the oil, \$40.50, from Rutherford's commissions.⁹²

Mr. Comer then wrote the following letter to Mr. Holt, who was then at Dickson, Tennessee, and which letter Mr. Holt received at that place.⁹³

"NASHVILLE, TENN., December 24, 1903.

"Mr. C. E. Holt, Dickson, Tenn.

"DEAR SIR: Mr. Rutherford, our agent at Gallatin, was in the office yesterday evening, and tells me that you instructed him to deliver to three or four customers at Gallatin vicinity 300 gallons of oil from his tank wagon and make no charge for same, your object in doing this being to induce these merchants to countermand the oil which they had purchased from the Evansville Oil Company. He states that he made the delivery in accordance with your instructions. I wish you would write me if you did this; and if you instructed Mr. Rutherford to do anything like this, you certainly did
 431 wrong. It has never been our purpose to resort to any such methods as these in order to turn the trade our way. You are aware that if the oil is delivered without record being made of the delivery, that the shortage is bound to show up in the agent's stock of oil at the end of the month, aside from the fact that the giving away
 431 of the oil, especially in such instances as Mr. Rutherford mentions, is entirely foreign to our general policy.

"Please write me fully by return mail in reference to the transaction, and oblige, Yours truly,

"(Signed)

J. E. COMER,
 "Special Agent." ⁹⁴

Mr. Holt states that he thinks he was at Nashville the day before Christmas,⁹⁵ but is positive he actually received the letter at Dickson.⁹⁶ It is clear from Mr. Comer's letter, written the day after Christmas (which was a holiday), that Mr. Holt came in from Dickson on the 26th instead of the 24th, and that it was the letter of the

⁸⁸ Wilson, p. 375.

⁸⁹ Wilson, p. 375.

⁹⁰ Rutherford, pp. 304, 310.

⁹¹ Rutherford, pp. 312, 304.

⁹² Rutherford, pp. 304, 310; Comer, 256.

⁹³ Holt, Trans., p. 346.

⁹⁴ Trans., p. 343.

⁹⁵ Trans., p. 346.

⁹⁶ Trans., p. 346.

24th which brought him in, for on the 26th Mr. Comer wrote to Mr. Collings as follows:

("Personal.)

"DECEMBER 26, 1903.

"*Giving Away Oil.*

"Mr. C. T. Collings, V. P., Cincinnati, Ohio.

"DEAR SIR: Referring to above subject: It has *just developed* that Mr. C. E. Holt, Refined Oil Salesman, and our Gallatin agent, gave away to customers in and near Gallatin, 300 gallons of tank wagon oil, in order to induce them to countermand oil which they had ordered from the Evansville Oil Company. This oil 432 was given away and delivered on November 6. When the agent sent in his monthly inventory for November, to this office, a shortage in stocks were shown at Gallatin. In correspondence with this office the fact was not brought out that a transaction of this kind had occurred, but as it is customary for us to hold up agents' drayage check until a shortage of this kind is settled, the Gallatin agent came to Nashville day before yesterday evening, and in talking to him about the matter, he stated that he had given away 300 gallons of oil *by direction from Mr. Holt*, who was in Gallatin when the oil was delivered. As soon as we received this information we charged the shortage at Gallatin to the agent, and deducted same from his drayage check. I also wrote a letter to Mr. Holt, asking for explanation of this matter, and asked the agent if he had ever been instructed by the Company to do anything like this, and he stated that he had not, and that the reason he did not take the matter up with us before delivering the oil was that he was of the opinion that Mr. Holt knew what he was doing.

"Mr. Holt came into the office *this morning* and stated that they gave away 300 gallons of oil, which was divided between four merchants, explaining that it was understood between he and the agent that they would give the oil away and pay for it themselves, and that they had it understood with the merchants the Standard Oil Company was not giving them this oil. This may have been the intention of Mr. Holt and the agent, but the merchants who received the oil, no doubt, are of the opinion that the Standard Oil 433 Company gave them the oil in order to induce them to countermand orders which they had given to the Evansville Oil Company. A very ugly feature in connection with this matter is that the matter has been taken up by the Evansville Oil Company, and a publication appeared *on the 23d* in a weekly newspaper at Gallatin, to the effect that the matter would be taken into courts and we would perhaps be indicted by the next grand jury at Gallatin. The manager of the Evansville Oil Company, Mr. Honeywell, was at Gallatin a few days ago, and no doubt is responsible for this publication. As soon as I received the facts in this case, I called on Col. Vertrees, and asked him if there was anything in the transaction for which we could be indicted or brought into court. He stated that, in view of the fact that we had not authorized the oil to be

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given away, and further, that as soon as we received the facts in the case, that we deducted the amount of this oil from the agent's drayage bill, refusing to pay him for it, that even if there was any violation of law in giving away oil in this manner, that our action in not recognizing the transaction would clear us of the violation of any Tennessee law. Col. Vertrees asked me to write the facts out just as I had stated them to him, and that he felt quite sure we would not be held for any violation of the law. As I did not know what action might be taken by the Gallatin authorities, I thought it best to consult Col. Vertrees at once. As the holidays are on now, it is hardly probable, even if anything is going to be done, that it will be done for several days.

434 "I wish you would write me by return mail, however, advising us just what to do under the circumstances, and if you approve of what we have already done.

"Mr. Holt certainly knew better than to authorize the agent to give away this oil. He knew that, aside from the fact that this office should have been notified before he took any such action, and also that this shortage would show up in the agent's inventory at the end of the month, that the giving away of oil in this manner was *entirely foreign* to anything that we had ever done in the past. This is the ugliest case that I remember ever coming up since my connection with the Standard Oil Company, and I cannot tell you how much I regret it. If you do not approve of my taking the matter to Col. Vertrees and of his handling it as outlined above, wire me Monday morning and I will have him hold it up until we get a letter from you.

"Yours truly,

J. E. COMER,
"Special Agent."⁹⁷

On the same day, December 26, 1903, Mr. Collings wrote from Cincinnati to Mr. Comer the following letter:

"DECEMBER 26, 1903.

("Clipping from Memphis Paper.)

"Mr. J. E. Comer, S. A., Nashville, Tenn.

435 "DEAR SIR: I herewith hand you clipping from the *Commercial Appeal*, of Memphis, December 24, in regard to the S. O. Co. being indicted for giving away oil at Gallatin, Tenn. Have you seen this, and what grounds are there for the statements?

"Yours truly,

"E.

"C. T. COLLINGS."⁹⁸

Obviously these letters are independent and have no relation to each other. Mr. Comer had heard of the matter from Wilson for the first time December 24, and December 26 was reporting it to his superior. Mr. Collings heard of it for the first time⁹⁹ when he read

⁹⁷ Trans., p. 355.

⁹⁸ Trans., p. 354.

⁹⁹ Trans., 354.

the *Commercial Appeal* of December 24, and not having received Mr. Comer's letter, he wrote for information. These letters evidently crossed in the mail. But upon the receipt of Mr. Comer's letter, Mr. Collings replied as follows:

"DECEMBER 28, 1903.

"Trouble at Gallatin.

"Mr. J. E. Comer, S. A., Nashville, Tenn.

"DEAR SIR: I am in receipt of your letter of the 26th instant, on the subject of giving away oil. I sent you Saturday a clipping from one of the Memphis newspapers about this Gallatin business. It is very unfortunate that our people will assume the authority of doing things like this and getting us into troubles of this kind. If I did not know that Mr. Holt acted in the matter with the best intentions in the world, I would insist on discharging him. Under the
436 circumstances, I see nothing for you to do but to insist on these gentlemen paying for the 300 gallons of oil. You may charge it to them at a nominal price, but the one point must be brought out, just as Judge Vertrees suggests, viz.: that the action on their part was wholly unauthorized, and we unhesitatingly condemn the action of our employes in this matter. Of course, if an employe of ours chooses to buy oil from the Company and give it away, these people must see that we cannot prevent it, or know about their action until the thing is over.

"I fully approve of your consulting with Judge Vertrees, and if anything further comes of the matter, would suggest you handle the case just as Judge Vertrees may advise you to do. My opinion is, however, that the matter will blow over. Please keep me advised about the matter, and whether or not anything further is done.

"Yours truly,

C. T. COLLINGS."

It will be observed that Mr. Collings suggests that Holt and Rutherford be charged for the oil at "nominal" prices—that is, at the price at which employes are always charged for oil and gasoline.² In point of fact, they were charged full price by Mr. Comer, because he made the charge before Mr. Collings' letter was received.³

Now, nothing can be clearer than that this transaction was
437 without the knowledge, consent or approval of any responsible or controlling officer of the Company, and that Holt and Rutherford knew it; that they concealed it, and concealed it as long as they could, and that when it was discovered, the managing officers of the Company disapproved of it and made Mr. Rutherford account, and pay, for the oil. It is equally clear that no such thing had ever been done in Tennessee by any agent before.

¹ Trans., 357.

² Trans., p. 358.

³ Trans., p. 364.

Mr. Holt states why he did it in this instance, and his explanation is clear. He says:

"Q. Had you ever done such a thing before?

A. No, sir.

Q. Or since?

A. No, sir.

Q. Had you ever done anything like it before?

A. No, sir.

Q. How came you to do this on this occasion?

A. Well, sir, I just can't tell you how I did it. I wanted to get the business over there, and it was something I thought would put a feather in my cap by doing it, by countermanding the orders, and I didn't know what else to do, and I didn't see how I was to countermand the orders by talking, so I just gave them the oil. It is true, I could not afford to give them the oil, but I did it, nevertheless."

It is also plain that neither the Company nor its counsel even imagined that this transaction could be a conspiracy, or if
438 one, that it could possibly be imputed to the Company. They may be mistaken, but that was their view during the two years that the criminal case was in this court undetermined.

This isolated transaction at Gallatin on the 12th day of October, 1904, is the conspiracy charged in the bill. That the facts are precisely as stated hereinbefore is testified to by merchants Hunter, Love, Lane and Cron, by Mr. Comer, Mr. Rutherford and Mr. Holt, Mr. Collings, Mr. Wilson and Mr. Whiteside, and *not a witness says that they were otherwise or different.*

At the May term, 1904, of the Circuit Court of Sumner County, the Standard Oil Company, Holt and Rutherford, were indicted. Four indictments were found, based on the different transactions with the four merchants. Comer, the principal agent in the district, was not indicted even. Obviously, because he could not be connected with the "conspiracies." They knew the facts. Mr. Rutherford had told Mr. Roseman about the affair, December 9th, 1903.⁵ He also told his friend Whiteside about it, and Whiteside had urged him to report the matter to the Company.⁶

The defendants were put on trial in the "Love Case" at the
439 October term, 1904. Mr. Rutherford, being a "Sumner County boy," was *acquitted*, but the Company and Mr. Holt

were found guilty and a fine of \$5,000 assessed against the Company and one of \$3,000 against Mr. Holt. The case was appealed to this Court, and heard and argued at the December term, 1904. In February, 1907, the case was decided. It was affirmed as to Mr. Holt and reversed, and the indictment quashed as to the Company.⁷

Mr. Holt was poor and unable to pay the fine, and it amounted to a work-house sentence of many years. Counsel for the Company and Mr. Holt explained his condition to the Company and proposed to the Attorney-General that the Company would pay the fine of

⁵ Trans., p. 321.

⁶ Trans., q. 181, p. 126.

⁷ Trans., q. 217, p. 297.

⁸ 9 Cates, 618.

\$3,000 provided it would be agreed that the minimum fine (\$100) be assessed against Mr. Holt in the three cases remaining at Gallatin untried.⁸ This was done, and the *Company* paid the \$3,000, and the \$300 fines (assessed in the other cases) imposed on Mr. Holt. It did this, *not* because it had agreed and promised to do so,⁹ but because he was unable and it realized that if Holt had erred it had been through *zeal* in their interest, and not through criminal intent. (The Attorney-General says in his deposition that his view was that the matter of Holt's going to jail "would be a rare monument to the generosity or infamy of the Standard Oil Company," and "the imprisonment of Holt would be an object lesson in regard to the Standard Oil Company."¹⁰

440 On the day the fine was paid, the 16th day of March, 1907, the present bill was filed. The material averments are as follows:

"Thereupon, information having come to defendant Company that said Evansville Oil Company had secured order for oil from, and sold oil to, its customers at Gallatin, as hereinbefore shown, and was thereby and in that manner competing with the oil business of defendant Company, the said defendant Company and its said agents, J. E. Comer, C. E. Holt, and O'Donnell Ruthreford, and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others, unlawfully made and entered into an arrangement, agreement and combination, with a view to *lessen*, and which tended to lessen, full and free *competition* in the sale of defendant Company's oil *then being sold or offered for sale at Gallatin*.

"And complainant further shows unto Your Honor that in order to carry said unlawful arrangements, agreements or combinations into effect, and *as a part* of such unlawful agreements, arrangements or combinations, the said defendant Company and its said agent, C. E. Holt, *induced* the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, to rescind and *cancel* their several purchases of oil or orders for oil from said Evansville Oil Company, and as a consideration or inducement for said rescissions or cancellations, and *as a part* of said unlawful arrangements, agreements or combinations, said defendant Company *gave without cost* or charge to the said

441 S. W. Love 100 gallons of oil, and to the said W. H. Lane fifty gallons of oil, and to the said J. E. Cron one hundred gallons of oil, and to the said L. C. Hunter fifty gallons of oil; and at its own expense, sent telegrams, in the name of said Love, Lane, Cron and Hunter, to said Evansville Oil Company, cancelling the orders of said parties.

"Complainant further shows unto Your Honor that the said Love and others named above not only rescinded and cancelled in the manner and as above shown, their several orders given to the Evansville Oil Company as aforesaid, but that they *refused to accept* or receive said oil when the same was shipped to Gallatin. So that the said Evansville Oil Company was driven from the field as a

⁸Trans., pp. 381, 382.

⁹Trans., Holt, p. 325.

¹⁰Trans., p. 381.

competitor with defendant Company in the oil business at Gallatin, and thereupon defendant Company, having succeeded by means of and through the aforesaid unlawful agreements, arrangements or combinations, in not only lessening, but destroying, full and free competition in the sale of its oil then stored at Gallatin and being offered for sale, immediately advanced the price of its oil, which was of inferior grade, as hereinbefore shown, from 13½ cents per gallon to 14½ cents per gallon, the price at which the said Evansville Oil Company had offered for sale and sold a grade of oil far superior, as complainant is informed and believes, to the oil sold by defendant Company.

"Therefore, complainant charges that defendant Company, a foreign corporation as aforesaid, has, in the manner hereinbefore set out, violated the provisions of section 1 of chapter 140 of the Acts of the General Assembly of 1903, and this bill is brought by the complainant, through her Attorney-General as aforesaid, in order that the punishment of such violations prescribed by section 2 of said act may be imposed upon said defendant Company, to wit, that said defendant Company be denied the right to do, and be prohibited from doing, business in this State." ¹¹

As will be perceived, the charge in the bill is narrow and restricted. The bill does not charge the defendants with engaging in a combination or conspiracy to lessen competition in the sale, and to advance the price, of oil in general at Gallatin, but only to lessen competition in the sale, and to advance the price, of that particular lot of oil which the Company then had stored at Gallatin, and which was then being offered for sale.

It will be observed that the charge is that all eight of the parties named, engaged in every of the conspiracies charged—not that they engaged in four conspiracies, with the four merchants respectively.

It will be also noticed that the averment is that all eight of the parties named entered into an "arrangement, agreement and combination" to lessen, and which tended to lessen competition in the sale of that particular lot of oil, and that it is further averred that they also entered into "certain unlawful arrangements, agreements, and combinations" to advance, and which tended to advance, the price of that particular lot of oil. That is to say, it is charged that they entered into one combination to lessen competition in the sale, and into several combinations to advance the price, of oil.

The defendant demurred to the bill on the ground that it charged that there was this agreement, and there were these agreements, but did not state their terms, and failed to state a case.¹² The demurrer was overruled.

Thereupon the defendant answers the bill.

The answer relied upon these defences:

1. That in point of fact the Company had not engaged in any conspiracy.

¹¹ Trans., p. 11.

¹² Trans., p. 11.

2. That the transaction, if an offense at all, was an offense against the laws of the United States, and not the laws of Tennessee.

3. That the proceedings were barred by the statute of limitations, particularly the statute of one year.

4. That the alleged offense is a *criminal charge*, and that the defendant cannot be put to answer that charge by bill in equity, but only by indictment or presentment.

5. That the transactions complained of were interstate commerce transactions, and the Courts of Tennessee had no jurisdiction over the same.

444 6. That the act under which the bill was filed and on which it was based, denied the defendant the equal protection of the laws, and was, for that reason, void.¹³

The defendant proceeded *immediately* to take its evidence. It took the depositions of the four merchants, Cron, Hunter, Love and Lane, and of the County Clerk, Harris Brown. As they were read by the Attorney-General, it is to be assumed that they will not be criticised.

Mr. Comer and Mr. Rutherford are dead, and the evidence they gave in the former case was read by the defendant. The evidence of Mr. Collins, Mr. Wilson, Mr. Whiteside and Mr. Coons, *which was not in the former case*, appears in this. References thereto have been made in the preceding statement of facts.

On the 14th day of November, 1907, the Attorney-General filed an *amended and supplemental* bill, averring that on the 30th day of October, 1899, the Standard Oil Company and the Cassety Oil Company, of Nashville, Tennessee, entered into an agreement for the term of five years, whereby the Cassety Oil Company agreed to

445 conduct its *oil and gasoline* business in its own name as theretofore, but for the Standard Oil Company. The Cassety Oil Company was to furnish its plant, equipment, clerical force, and all necessary labor, and sell the oil and gasoline of the of the Standard Oil Company for it, and account to it for all profits. It was to push the business in good faith, and be paid \$500 a month for clerk hire, rent services, etc. It was also provided that if the sales exceeded 200,000 gallons per annum, the Cassety Oil Company was to receive a bonus of one cent per gallon on the excess.

The supplemental bill further averred that the Standard Oil Company, after the execution of this contract, raised the price of oil "several cents" per gallon, and got full control of the market, and has had full control of the market at Nashville *ever since*.

It avers that, having "eliminated" the Cassety Oil Company as a competitor, and having "no further use" for the Cassety Oil Company, October 30, 1904, when the contract expired, the Standard Oil Company *refused to renew* the contract and has remained in "practical control" of the oil and gasoline business at Nashville "to this date."¹⁴

¹³ Trans., pp. 11-25.

¹⁴ Trans., p. 26.

As an excuse for these years of delay, the bill says that the first information came to the State while the evidence was being taken in the case. It appears from the evidence that the first information Mr. Attorney-General had was derived from the following letter:

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NASHVILLE, TENN., May 9, 1907.

Hon. C. T. Cates, Jackson, Tenn.

DEAR SIR: I write to ascertain the status of the *State vs. Standard Oil Company*. We are strictly oil manufacturers, and dealers at this place of long years' standing, and this inquiry is no idle curiosity with us, but we want to keep in touch, as far as possible, with the situation as it develops, and govern ourselves accordingly.

"I refer to Judges McAlister and Neil as to my reliability. With best wishes, I beg to remain

"Yours very truly,

W. M. CASSETY."

While the statements of this witness are not hurtful, his motive was, and his testimony is of such a character as to show that if his reference to Judges McAlister and Neil was by permission, that permission is likely to be withdrawn for the future.

The statements in the letter that the Cassety Oil Company is strictly an oil manufacturer is wholly untrue. The Company never manufactured a single barrel of oil.¹⁵ Mr. McIlwaine is the President of the Cassety Oil Company, and a witness presented by the Attorney-General himself. Speaking of Cassety he says, "I pay very little attention to what he says."¹⁶ "I don't know what
447 the man is capable of."¹⁷ When Mr. Cassety was asked if he is not indebted to the Standard Oil Company for oil for which he will not pay, and how much he was indebted to the Cassety Oil Company when he was deposed from its presidency, he refused to answer.¹⁸

He testified that the contract *penalized* the Cassety Oil Company one cent per gallon on sales in excess of 200,000 gallons per annum,¹⁹ when the *truth is just the reverse*. It provides for the payment of a *bonus* of one cent per gallon on the excess.

The *facts* of the case are quite different from the statements of the supplemental bill. The Cassety Oil Company was a leader in coil oil, axle grease, lubricating oils, and soap. It also manufactured soap.²⁰ Prior to 1892 or 1893,²¹ the company had built up a "splendid" soap business, "quite" an oil business, and a good business in lubricating oils and axle-grease, at Nashville.²² Mr. McIlwaine, the President of the company, was its buyer at that time. In 1892 or 1893 the Millers, of Pittsburg, Pa., established an oil business at

¹⁵ McIlwaine, q. 18, p. 198; q. 22, p. 199.

¹⁶ Trans., q. 83, p. 204.

¹⁷ Trans., q. 85, p. 205.

¹⁸ Cassety, q. 208, p. 188; q. 209, p. 189.

¹⁹ Cassety, qq. 52, 53, p. 177; q. 41, p. 176.

²⁰ McIlwaine, p. 198.

²¹ McIlwaine, q. 18, p. 198.

²² McIlwaine, q. 18, p. 198.

Nashville under the name of the Miller Oil Company. They had refineries in Pennsylvania as well as the Standard Oil Company.

These companies, the Miller Oil Company and the Standard Oil Company, began to "fight" at Nashville, with the result that in October, 1899, the oil business of the Cassety Oil Company, which company had kept in the market but had no refineries, had "dried up practically."²³ The Standard Oil Company whipped out Miller, and bought his lot, which was all he had in the way of an establishment in Nashville; and he left.²⁴ At this time the Cassety Oil Company had "mighty little *coil oil* trade left."²⁵

This company had been buying all its oils from the so-called "independent" companies, but it had become very difficult to get oil from them.²⁶ Apparently the Standard Oil Company did not understand this as well as the Cassety Oil Company did, for when negotiations were opened, the parties came to terms—the contract set up in the supplemental bill. In substance the contracts made the Cassety Oil Company the *agent* of the Standard Oil Company at Nashville for the sale of its oil, but not an exclusive agent.

The Cassety Oil Company was to sell this oil in its own name, thus ordinarily making the impression, if nothing was said, that it was selling as owner and dealer, and not as agent. But it must be borne in mind that the Cassety Oil Company was a dealer in axle-grease, lubricating oils, coal oil and soap, and manufactured its own soap, and that seventy-five per cent. of its working capital was in the soap.²⁷

The understanding of the contract was that it made the Cassety Oil Company the Standard Oil Company's agent,²⁸ and counsel were consulted who advised that the contract was lawful and valid.²⁹

The contract was made at the Standard Oil Company's office in Cincinnati, Ohio.³⁰ McIlwaine went there in person to make it. He and Mr. Collings made it. It was reduced to writing, and the President, an old gentleman named McDonald, called in from his office across the hall to sign it for the Standard Oil Company.³¹ The signed copy was then handed to Mr. McIlwaine to be taken back to Nashville to be examined by the Executive Committee, and to be signed by him if approved, and he signed it and returned it to Mr. Collings at Cincinnati.³² The oil was to be delivered in tank cars at Nashville from the company's refineries in other States.³³

Although the relation of the two companies was not spoken of "promiscuously,"³⁴ Mr. Cassety himself admits that after its execution the public generally supposed the Cassety Oil Company to be a branch of the Standard Oil Company.³⁵

²³ McIlwaine, q. 18, p. 198.

²⁴ McIlwaine, q. 25, p. 199.

²⁵ McIlwaine, q. 31, p. 199.

²⁶ Cassety, qq. 171-174, p. 186; q. 47, p. 177.

²⁷ McIlwaine, q. 69, p. 203.

²⁸ Collings, p. 366.

²⁹ McIlwaine, q. 148, p. 210; q. 123, p. 208.

³⁰ McIlwaine, qq. 109-113, p. 207; Collings, p. 369.

³¹ McIlwaine, q. 62, p. 202; q. 102, p. 206.

³² McIlwaine, q. 114, p. 207.

³³ McIlwaine, q. 117, p. 207; Cassety, q. 95, p. 180.

³⁴ Cassety, q. 252, p. 191.

³⁵ Cassety, q. 161, p. 185; q. 248, p. 191.

When the contract expired in October, 1904, the Cassety Oil Company sought to renew it, but the Standard Oil Company declined to do so.

The bill *avers* that it declined because it had no further use for the Cassety Oil Company, as it had gotten *control* of the Nashville market. But the *facts* are that it declined because the Company proposed to take no chances as to its being considered illegal.³⁶

Competition was *not* destroyed by the agreement, and it did *not* result in giving the Standard Oil Company the control of the Nashville market, down to this date, as alleged in the bill. The Gulf Refining Company is not only a competitor at Nashville,³⁷ but it has a branch established here, and employs the tank-wagon system.³⁸

Neither is it true that the price of oil was "advanced" at Nashville after the agreement was made. There is no evidence on that point prior to 1893, but the record shows the fact to be otherwise since that date.³⁹ The Company has had no contract of any kind with the Cassety Oil Company since the expiration of the contract set forth in the bill—October 30, 1904.

451 It was agreed that the demurrer which the defendant desired to file to this amended bill might be incorporated in the answer, and this was done. Upon the hearing the Chancellor sustained the point made by the demurrer that there was no law in force in Tennessee when this contract was made, inflicting the punishment of *ouster* for a conspiracy against trade, and dismissed the amended bill.

The grounds of defense stated in the answer are substantially those stated in the answer to the original bill. The original bill was sustained, and a decree pronounced enjoining the defendant from doing any business in Tennessee not of an interstate commerce character.

Both parties have appealed—the Attorney-General from the decree dismissing the amended bill, and the defendant from the remainder of the decree.

Exceptions were filed to the evidence of certain of defendant's witnesses as to the contents of a letter or report written by salesman Holt, October 12, 1903, to Mr. Comer, and they were sustained. Those exceptions can be more conveniently stated and considered in another connection, although the assignment of errors refers thereto.

Defendant assigns the following

Errors.

The Court below erred in each and every of the following particulars, namely:

- 452 1. In overruling the demurrer to the original bill.
2. In not dismissing the original bill on the merits.
3. In finding and decreeing that the defendant was in fact guilty of a violation of the provisions of the said Anti-Trust Act of 1903.

³⁶ McIlwaine, q. 129, p. 208; q. 149, p. 210.

³⁷ Coons, q. 177, p. 228.

³⁸ Coons, q. 178, p. 228; q. 99, p. 220.

³⁹ See Tables, Record, pp. 249, 255, 260, 266, 270.

4. In not finding and decreeing that the alleged agreement, arrangement or combination, if unlawful, was unlawful for that it was in violation of the Acts of Congress, relating to interstate commerce, only, and not in violation of the said act, which is chapter 140 of the Acts of 1903, and beyond the jurisdiction of that Court.

5. In not finding and decreeing that if the alleged arrangement, agreement or combination be a violation of the said Act of Tennessee of 1903, it is such violation only because it violates provisions of said act regulating interstate commerce, and which for that reason are void, and that no decree can be entered in this cause for a violation thereof.

6. In not holding and decreeing that the present proceedings put the defendant to answer a criminal charge without indictment or presentment, or without being based upon a conviction upon a previous indictment or presentment—in violation of the Constitution of Tennessee.

7. In not holding and decreeing that the present proceeding is barred by the statute of limitations of Tennessee.

453 8. In not holding and decreeing that the present proceeding is barred by the statute of limitations of Tennessee of one year.

9. In not holding and decreeing that the bill be dismissed for that the said act (chapter 140 of the Acts of 1903, upon which the bill proceeds) is unconstitutional and void, because—

(a) It arbitrarily and capriciously denies to the defendant, a foreign corporation, the right to a trial by jury, for a violation of its provisions.

(b) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions the right of trial by jury granted to natural persons, charged with violating its provisions.

(c) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions, a trial according to the laws of the land for the trial of criminal charges whereby the defense of the statute of limitations can be pleaded and relied upon, while it grants the same to natural persons charged with violating its provisions.

(d) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions a trial according to the procedure prescribed by the laws of the land for the trial of criminal charges, whereby the guilt of the party charged must be established beyond a reasonable doubt in order to convict,

454 and obliges the corporation to answer and defend in a procedure whereby it may be convicted upon a mere preponderance of the evidence, or upon less evidence than such as is required to establish guilt beyond a reasonable doubt, when it grants to natural persons charged with its violation, the right to be tried according to that procedure prescribed by the laws of the land under which the accused must be proven guilty beyond a reasonable doubt, in order to convict.

10. In not holding and decreeing that the said act (chapter 140,

Acts 1903) is null and void for that it is in violation of the Constitution of the United States, particularly the Fourteenth Amendment, in that it deprives the defendant of its liberty and property without due process of law.

It deprives of its liberty and property without the process of law in each and every of the respects mentioned and stated under Error No. 9. hereinbefore, marked *a*, *b*, *c* and *d*, and in Error No. 6; and which are here referred to, and made a part hereof, the same as if here repeated again; and the Court erred in not dismissing the bill accordingly.

11. In not holding and decreeing that the said act (chapter 140, Acts 1903) is null and void for that it is in violation of the Constitution of the United States, particularly the Fourteenth Amendment, in that it deprives this defendant, a person within its jurisdiction, of the equal protection of the laws.

455 It denies that equal protection in each and every of the respects mentioned and stated under Error No. 9 hereinbefore marked *a*, *b*, *c* and *d*, and in Error No. 6, and which are here referred to and made a part hereof the same as if here repeated again; and in not dismissing the bill accordingly.

12. In not holding and decreeing that the said act (chapter 140 of the Acts of 1903) is null and void for that it is in violation of article 1, section 8, subsection 3 of the Constitution of the United States, in that it is an attempted regulation of commerce among the several States.

The Court erred in sustaining the following exceptions, respectively, taken by the Attorney-General to the evidence of the witnesses named respectively:

No. 13. (Exception No. 1.) Complainant excepts to the testimony of J. E. Comer, to the effect that the daily reports made by Holt of his doings at Gallatin, in relation to securing the countermand of the orders of Love and others to the Evansville Oil Company, contain no statement that he had given any oil to any one to induce them to countermand any orders, and object to any testimony in relation to the contents of the written reports or letters of Holt in reference to that matter, because the originals were the best evidence, and were not shown to be lost or unintentionally mislaid.

456 The answer objected to is found on page 18 of Comer's testimony, and is responsive to a question on page 16.

Question by Mr. VERTREES:

"You have been asked about a letter that Holt wrote to you as to his visit up there, or the result. Did that letter make any statement as to having any oil to induce any one to countermand any orders?"

The next question is, in substance, the same, and the answer is as follows:

"None of the reports contained any such statement."

Then the next question is as follows:

"Or any of the letters?"

"None of the letters." (Comer's Testimony, Exhibit No. 3 to stipulation of council, pp. 16, 18.)

At the time Mr. Comer gave this testimony, he showed in the answer to the next question, after the question and answer last quoted, that the report or duplicate of it was in Nashville. (Comer's Testimony, p. 18.)

He also showed in his testimony (p. 11) that the report itself, at the time he gave his testimony, was in the Nashville office.

457 In relation to that matter, C. E. Holt, witness for defendant, testified, at the bottom of page 15, and at the top of page 16, of this testimony, as follows:

"Q. What were the requirements of the Company as to reports of you as salesman of what you did?

A. I was to make a complete report every day of pretty nearly everything I said.

Q. What was the nature of these reports, in duplicate, or triplicate, or how?

A. I made three copies, original, duplicate, and triplicate.

Q. What did you do with these?

A. Kept one myself, mailed one to Nashville, and one to Cincinnati.

Q. Did you make a report of that character of your transactions at Gallatin: did you make a report?

A. I made a report of countermanding the oil, but did not make any report of giving away oil."

Complainant objects to the answer last above quoted, for the reason that it is an attempt to prove by oral testimony the contents of a written instrument, which, in so far as the testimony shows, is still in existence. There is no pretense that the copy retained by Holt had been destroyed, and, while Collings, in his testimony (p. —), refers to the destruction of some papers, he does not pretend to know or say that the triplicate copy of the report sent to him has been destroyed.

No. 14. (Exception No. 2.) Complainant also objects to the following question of C. E. Holt, on page 39 of his testimony, 458 wherein he attempts to state the contents of a written report above referred to, for the reason above stated:

"While I could not recall exactly what I told him, but I told him in my report just the same that I had secured the countermand of those orders all right, and I told him that I did it in the same line of argument like he told me to do, how to talk to them."

No. 15. (Exception No. 3.) Complainant also excepts to the testimony of C. T. Collings, in relation to the contents of the copy of Holt's report of his doings at Gallatin, which was sent to the Cincinnati office, because said report is the best evidence of its contents, and, further (Collings, testimony, p. 107), it appears that he never saw said report.

The complainant excepts to the action of the Court in overruling its said exception to above evidence.

Exception No. 6. Complainant also objects to the following answers to questions put to witnesses for the defendant, S. P. Wilson, found on page 115 of his testimony.

"Q. Now, recurring to those daily reports—did any report that

came in from Rutherford or Holt, the salesman, and you say they passed through your office?

A. Yes, sir.

Q. Did any of them contain any statement to the effect that those orders at Gallatin had been countermanded by gifts of oil, any of them?

459 A. No, sir; the reports stated that certain orders had been countermanded, but there was no intimation in any of them that any gift had been made of money or oil."

These answers — objectionable because they attempt to state the contents of a written instrument, a copy of which was in the possession of Holt, one in the possession of the Cincinnati office, and another in the possession of Comer, or the Nashville office.

In this connection it is proper to call the attention of the Court to the statement of witness Wilson, on cross-examination, on page 119 of his testimony, that the papers and documents pertaining to the Nashville office were in the office at Nashville when the witness left the employ of the company, in March, 1907.

No. 16. (Exception No. 7.) Complainant further excepts to the testimony of witness C. E. Holt, in relation to the alleged copy of the letter to him from J. E. Comer, and to said alleged copy, dated December 24th, 1903, and found on pages 55 and 56 of the volume containing the testimony of said Holt, because said letter purports to be taken from a copy copied into a transcript on file in the Supreme Court of Tennessee, and because it is an attempt to prove by oral testimony the contents of an alleged letter, when the original thereof had been given by Holt to J. E. Comer, special agent of defendant, and a letter press copy thereof was in the Nashville office of
460 the defendant, as shown by the testimony of said Collings, on pp. 45 and 46 of the volume containing his testimony.

No. 17. (Exception No. 8.) Complainant also excepts to the testimony of C. T. Collings, and the alleged copy of a letter claimed to have been sent by him to J. E. Comer, under date of December 26th, 1903, and to said alleged copy, and found on page 74 of the volume containing said Collings' testimony, because the original of said letter is not produced or accounted for. It is claimed that said letter was sent to said Comer as special agent, and, therefore, it should be among the papers of defendant company at its Nashville office, and, moreover, said Collings (p. 73) only *thinks*, and does not know, that said copy is out of his own letter book.

No. 18. (Exception No. 9.) Complainant also objects to the testimony of the witness, Collings, in relation to the alleged copy of a letter from J. E. Comer, under date of December 26th, and to said alleged copy, set out on pages 76 to 79 of the volume containing the testimony of said Collings, because, while he says (p. 75) that he has been unable to find the original, said original is not satisfactorily accounted for, and the tissue copy produced and set out as aforesaid he has no personal knowledge of, but thinks that he got it from Nashville and thinks it was furnished to him by Mr. Coons. (P. 75 of Collings' testimony.)

No. 19. (Exception No. 10.) Complainant also excepts to
 461 the testimony of C. T. Collings, in relation to an alleged letter under date of December 28th, 1903, and the alleged copy of said letter, claimed to have been written by him to J. E. Comer, and found on pages 80 and 81 of the volume containing Collings' testimony, because the original of said letter is not produced, but said Collings shows, on page 78, that he sent the original of said letter to Comer, and he has no personal knowledge of the alleged tissue copy produced by him and copied into the record as above stated.

No. 20. (Exception No. 11.) Complainant further excepts to the testimony of John J. Vertrees, Esq., wherein he attempts to set out, on page 126 of the volume containing his testimony, the contents of Holt's written report, and of his doings at Gallatin, when he secured the countermand of the orders given by Love and others to the Evansville Oil Company, because in his cross-examination, Mr. Vertrees shows that he does not know whether the alleged copy shown to him was in the handwriting of Holt, or was, in fact, the report made by Holt, and because, further, as above shown, one of the triplicate originals of said report was in the possession of Holt, another in the possession of the Cincinnati office, neither of these triplicates being shown to have been lost or unintentionally mislaid.⁴⁰

Exceptions were duly taken by the defendant.

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I.

The various exceptions taken by the Attorney-General to portions of the evidence were not well taken. They may be disposed of at the same time.

A letter, or report, called "Daily Report," was written October 12, 1903, from Gallatin by Mr. Holt to Mr. Comer, at Nashville. Comer and Holt both testify that while the letter stated that orders given to the Evansville Oil Co. had been countermanded, it did not state how, or in what manner, such countermands had been secured. The exception of the Attorney-General is that it does not sufficiently appear that the original report or letter is not in existence.

Mr. Collings also testified that according to the course of business the report would have been submitted to him if it contained anything unusual, and that this would have been unusual, and that no such report was ever submitted to him. He also testifies that his first knowledge of the matter was December 26, 1903, when he saw a copy of the *Commercial-Appeal* newspaper of Memphis.⁴¹

Mr. S. P. Wilson, who was at that time first assistant to Mr. Comer, but is not now in the service of the Company, testifies that according
 463 to the course of business this report would have come to him, and that no report came containing any statements that orders had been countermanded at Gallatin through gifts of oil. He testifies that his first knowledge of the matter was about December 23, 1903, when Mr. Whiteside informed him of it.⁴²

⁴⁰ See Trans., pp. 395-402.

⁴¹ Trans., pp. 351, 371.

⁴² Trans., p. 377.

Mr. Holt introduced a copy of the letter written by Comer to him, which copy is taken from the original record in the former case of the *State vs. Standard Oil Company*, now reported in 117 Tennessee, page 618.

Mr. Collings produces certain copies of letters written by Mr. Comer to him, dated December 26, 1903, and also a copy of a letter written by him to Comer of the same date. These letters are to be found on pages 354-357 of the transcript.

Mr. John J. Vertrees testified that he saw the original or what was presented to him as the original report, and that it contained no statement as to gifts of oil to any one.⁴³

Exception is taken to the evidence of Mr. Vertrees because he cannot state that he knew the letter given to him was in the handwriting of Mr. Holt, being unacquainted with Mr. Holt's handwriting.

The exceptions of the Attorney-General to this evidence are to be found on pages 395-399 of the transcript, and they are all of the same nature, namely: That where oral evidence is given as to the contents of a writing such as the letter or report of Holt, it must be shown that the original cannot be found, and that the evidence does not show in this case sufficiently that the original cannot be found, or that the copies that exist cannot be produced. And where copies or letters are produced, the exception is that the loss of the originals are not accounted for, and therefore secondary evidence is not admissible.

The exceptions were sustained by the Court below, and error has been assigned to that action.

The loss of the originals is shown and their absence is sufficiently accounted for. The original or first case, the criminal case, reported in 117 Tennessee, was tried at Gallatin, September 22, 1904. At that time the original report was in the Nashville office at Nashville,⁴⁴ and there were no directions to any one to take it to Gallatin.⁴⁵

The case was tried at that date and appealed to the Supreme Court to the December term, 1904. It was tried in this Court at that term, but it was not decided by this Court until February, 1907, or *two years* after the argument and trial.

The defendants and their counsel had no apprehension of a conviction.⁴⁶

The bill in this case was filed March 16, 1907. During this interval, that is, in the month of April, 1906, the Company moved its principal office from Cincinnati, Ohio, to Covington, Ky.⁴⁷ In the fall of 1906, it again moved from that office in Covington to another more commodious office in the same place.⁴⁸

At the time of the first removal the Company had as many as ten rooms full of old papers and files of every description. Such as they

⁴³ Trans., p. 382.

⁴⁴ Comer, p. 201.

⁴⁵ Holt, p. 348.

⁴⁶ See letter of Comer, Dec. 26, 1903, Trans., p. 356.

⁴⁷ Trans., p. 350.

⁴⁸ Trans., p. 350.

deemed valuable were preserved and all of the others were destroyed at the first removal.⁴⁹ There were several tons of these papers.⁵⁰

Mr. Comer, the Nashville agent, died October 14, 1906. In January, 1907, it was determined to make Nashville a mere local agency.⁵¹ The books and papers were again gone over and all deemed most important were taken to Covington, and the remainder destroyed.⁵²

Now the report made by Mr. Holt is a daily report, which the Company requires to be made by its salesmen, of whom there were about 150.⁵³ This report was not at the trial at Gallatin in September, 1904, and the fact that it was not produced then was commented on by the Attorney-General.⁵⁴ It appears at that time to have been in the Nashville office at Nashville.⁵⁵

465 After the trial, and while the case was pending in the Supreme Court, Mr. Vertrees, counsel for the defendant, requested the Company to search for that paper.⁵⁶ It was found and submitted to him.⁵⁷ It appears that Mr. Comer delivered this report to Mr. Vertrees, counsel for the Company, telling him that Mr. Holt and Mr. Collings had copies of it,⁵⁸ and that Mr. Vertrees said that it was a very valuable document in the case, and he would retain it.⁵⁹ This statement of the witness made it necessary for Mr. Vertrees to testify. He testifies that he did receive that paper and did represent to Mr. Comer that it was important; that he is unable to state whether he retained it himself or returned it to Mr. Comer.⁶⁰ He states that it is not in the file of papers relating to the Company's business in his office, and that he has caused diligent search to be made through all his papers, but that it could not be found.⁶¹ A similar search has been made through the papers of the Company, and neither it nor the copy could be found.⁶²

The copies of the letters produced were sent from the Nashville office to Covington—evidently being found in Mr. Comer's desk after his death.⁶³ Now, under the circumstances of the situation, it is respectfully submitted that the loss of the original is sufficiently shown and that secondary evidence of its contents is admissible. It is to be remarked that the evidence is not as to the contents of the paper directly, but negatively, that it did not contain a certain statement—namely, that it did not show that any gifts of oil had been made to secure a countermand of the orders. The evidence is conclusive that the letter contained no such statement, and no one pretends to say that it did.⁶⁴

⁴⁹ Trans., p. 350.

⁵⁰ Trans., p. 350.

⁵¹ Trans., p. 351.

⁵² Trans., pp. 351, 363.

⁵³ Trans., p. 371.

⁵⁴ Trans., p. 382.

⁵⁵ Comer, p. 291.

⁵⁶ Trans., p. 383.

⁵⁷ Trans., p. 382.

⁵⁸ Trans., p. 371.

⁵⁹ Trans., p. 371.

⁶⁰ Trans., p. 383.

⁶¹ Trans., p. 383.

⁶² Trans., p. 371.

⁶³ Trans., pp. 354, 357, 363.

⁶⁴ Holt, p. 321; Collings, p. 371; Wilson, p. 377; Comer, p. 296; Vertrees, p. 382.

II.

The evidence as to report is unimportant, inasmuch as it is proven as a distinctive fact that the managing agents had no knowledge of this transaction at Gallatin.

It is not important to the defendants, because the fact is proven sufficiently otherwise. It is proven as a *distinctive fact*, without reference to any writing whatsoever, by both Mr. Rutherford and Mr. Holt that they agreed to conceal the fact that the oil had been given away, and that they did conceal it from Mr. Comer and the Company.⁶⁵

Mr. Holt and Mr. Comer also showed that a day or two after the transaction, Holt came to Nashville, and they talked upon 468 the subject of the Gallatin countermands, and that nothing was communicated as to the gifts of oil by Holt to Comer, although Comer asked him how he had secured the countermands,⁶⁶ and at that time Comer had no knowledge of any such gifts.⁶⁷ It is also shown by Mr. Wilson, Mr. Comer's assistant, and by Mr. Comer, and by Mr. Collings as a distinctive fact, without reference to any report, or paper, that neither of them had any knowledge of any gifts of oil until just before Christmas, 1903.⁶⁸

It is also shown that it was against the orders and policy of the Company for such things to be done, and that it never had been done by Holt, or any other agent in the State of Tennessee, at any time. All the foregoing evidence has no relation whatever to the report. If the Attorney-General desired to fetch in the report, in order to show that all this testimony was false, and that a written report had informed these officers of the Company that the orders had been countermanded through gifts of oil, the non-production of the report would, under such circumstances, be a matter to be remarked upon as one going to the credibility of the witnesses, but it could not render their evidence inadmissible. In so far as they might attempt to state the contents of the paper whose loss had not been sufficiently accounted for, it would be inadmissible. But the other 469 statements that in point of fact they had no knowledge of the matter, and that it had not been communicated, would not in the least be affected by evidence as to the report.

It must be remembered that not a single witness pretends to testify that Comer, or Collings, or Wilson, or any controlling agent of the Company had any knowledge whatsoever of these transactions. The only persons who had knowledge of it were Holt and Rutherford, and they agreed to, and did, conceal it.

⁶⁵ Rutherford, pp. 304, 309; Holt, pp. 319, 320.

⁶⁶ Trans., p. 334.

⁶⁷ Trans., p. 285.

⁶⁸ Trans., pp. 285, 377, 353.

III.

The demurrer to the original bill should have been sustained because it does not set forth the nature and terms of the agreement alleged to be illegal.

The averment of the bill is that the defendant Company, three of its agents, and four merchants, all of whom are named, entered into an agreement or combination, with a view to lessening, and which tended to lessen, full and free competition in the sale of oil of the Standard Oil Company "then being sold, or offered for sale at Gallatin;" that said above named persons, and perhaps others, unknown, entered into "certain" unlawful agreements or combinations which were designed, and which tended, to advance the price or cost to the purchaser, or consumer of the Standard Oil Company's "said oil,"
 470 *then being sold or offered for sale at Gallatin; and that in order to carry said agreements or combinations into effect, and as a part thereof, the defendant Company and one of its agents (Holt) induced the four merchants to countermand the orders they had given to the Evansville Oil Company, hereinbefore described; and that by means of these unlawful agreements and combinations the defendant lessened and actually destroyed "free competition in the sale of its oil then stored at Gallatin, and being offered for sale."*

An examination of the bill shows that it is *first* charged that the parties entered into *an* agreement to lessen free competition in the sale of oil which the defendant was then selling or offering for sale, and that in a distinct paragraph it is subsequently charged that these parties *and* "perhaps others unknown" entered into *certain* unlawful agreements to advance the price of that same oil to consumers.

The first charge is that the defendant and seven other named persons entered into *an* agreement to *lessen competition* in the sale of oil then being sold or offered for sale by the Company.

The next charge is that the defendant, these seven named persons and perhaps others unknown, entered into *certain agreements* to advance the price of *that* oil to consumers.

It is then charged that in order to carry said *agreements*
 471 (meaning the "certain" agreements *last* referred to in the bill) into effect, and as a part thereof, the four merchants were induced to countermand the orders.

While the *act of inducing* the merchants to countermand their orders is charged to be a *part* of the certain "agreements" entered into to advance the price of oil to consumers, it is not charged to be a part of the "agreements" entered into to lessen competition.

This is all that is said with reference to the agreement to lessen competition, and as to the certain agreements to advance the price to consumers.

This bill does not even state *where* either the "agreement" or the "certain agreements" were made. It does not even charge that they were made in the State of Tennessee.

It does not even charge *where* the defendant and its agent Holt

"induced" the merchants to cancel their purchase-orders. It does not state *where* the countermanding telegrams were sent from.

It does not state the *nature* nor the *terms* of the "agreement," nor of the "certain agreements."

The bill does state the *purpose*—that is, that the agreement was made to lessen competition in, and the certain agreements were made to advance the price to consumers, of the particular oil which the defendant then had stored at Gallatin for sale; and it does state the *effect*—that is, that the "agreement" and the "certain agreements" tended to do what was designed and proposed; but it *does not state the nature or terms of the agreement*. These are fatal omissions.

In *State v. Witherspoon*, 115 Tenn., 140, it appears that one Witherspoon was indicted under this very act. The indictment charged that the A. S. F. Company and the S. S. & C. Company had entered into an agreement to lessen, and which tended to lessen, full and free competition in the importation and sale of articles—(continuing in the very words of the statute); and that Witherspoon, as agent of the S. S. & C. Company, did carry out the stipulations and purposes of that unlawful agreement, in Madison County, Tennessee. The indictment was quashed. It was quashed upon the ground that it did not state the *terms* of the agreement, or arrangement. The case quotes with approval that part of the opinion of Mr. Justice Neil in *Smartt v. State*, 112 Tenn., 539, wherein it is said that the principle underlying the rule is, that "there must be sufficient *facts* alleged to reasonably identify the special transaction upon which the defendant is being prosecuted, *not only that he may know whereof he is accused*, and may prepare his defense, but also, in case of a subsequent prosecution, it may be made to appear whether he was prosecuted twice in the same matter."

In *United States v. Cruikshank*, 92 U. S., 558, the Chief Justice said that an indictment for conspiring should state *facts*, not conclusions of law alone; and that the *acts and intent* must be set forth in the indictment "with reasonable particularity of time, place and circumstances." He said "the indictment should state the particulars to inform the Court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

"There should be such a particular statement of the facts and circumstances as will inform the accused of the specific offense charged."⁶⁹ This bill of ouster, brought as it is to convict and punish for crime, ought to be as explicit as an indictment. But it is not. It does not state what the *terms* of the agreement were, nor the *means* by which it was to be effectuated, nor the place where it was made. It does charge that as part of the "agreements" the Company and Holt *induced* the four merchants to cancel the orders, but it is not charged that it was part of the agreement that they *should* induce them to countermand; and if it be so taken, it assumes only to state a "part," a fragment of the "agreements" to advance prices. It

⁶⁹ 8 Cyc., p. 662.

is not averred that they induced the merchants to countermand the orders as a part of the agreement made to lessen free competition.

Moreover, how is it possible for the *act* of the defendant
474 Holt in inducing the merchants to cancel the orders, to be a part of an illegal agreement? Such an *act* may be done to effect, or in pursuance of, an *agreement*, but it cannot be a part of an *agreement*. If it be construed to mean that it was a part of the conspiracy that the Company and Holt *should* induce the merchants to cancel their orders, we have this situation: Four merchants of Gallatin conspire with the Company and its agent Holt, that Holt should induce these same four merchants to cancel the orders. That is to say: A, B, and C conspire that B shall induce C to commit a crime. It would seem that C was already "induced" when he conspired with A and B that he should be induced.

Every agreement to suppress competition and to advance prices is not illegal. Suppose that A owns all the stock of a company that deals in oil, and that he attends to all its business himself, and that he has practically a monopoly of the business; can he and his company "conspire" in such case?

Suppose that all the oil dealers in Gallatin should form a corporation which takes over and buys all their establishments and makes one of them, and that the stockholders do this to control the oil market; is that an illegal conspiracy or combination?

Suppose that a firm of four partners advance the price of oil because their firm happens to have control of all the oil on the market; is that agreement to advance a criminal one?

475 Yet in these cases competition is lessened and prices advanced by reason of agreements made. This shows the necessity for setting out the nature and terms of the agreement charged to be illegal. An agreement is not criminal because the Attorney-General sees proper to apply the terms "illegal" and "criminal" to it.

IV.

The alleged "agreement" made at Gallatin was not illegal. The fact that Holt, the agent of the Standard Oil Company, gave oil to the Gallatin merchants under agreements that they would cancel the orders they had severally given to the Evansville Oil Company, and that he did this for the purpose of stifling competition, is unimportant and immaterial. It did not make the transaction criminal.

The transaction at Gallatin was no violation of any law. Stated in the briefest terms it was this: Holt, a traveling salesman of the Company, and Rutherford, its local agent at Gallatin, gave the four merchants 300 gallons of oil (in all) to countermand orders they had given to the Evansville Oil Co. Holt and Rutherford were
476 subordinate employees of the Standard Oil Company. They had no authority to fix the price of oil or to sell it at any other price than that fixed by their superior, Mr. Comer, neither had they authority to give oil away for any purpose, or any account, as they well knew.⁷⁰ They were under the control of Mr.

⁷⁰ Trans., pp. 352, 290, 317, 319.

Comer, the "special agent" at Nashville, and he in turn received prices and directions from Mr. Collings, the Vice President, at Cincinnati.⁷¹

Holt and Rutherford had no authority to give oil away to secure countermands of orders to others,⁷² and knew it.⁷³

Under the settled usage of trade, as already shown⁷⁴ these merchants had the right to countermand the orders at pleasure—for a good reason, for a bad reason, or for no reason at all. When Mr. Holt approached them and sought to have them countermand their orders to the Evansville Oil Co., he sought to induce them to do only that which was lawful. It may not have been fair trade, but it was not unlawful. Whether he sought to move them by appeals to old friendship, or argument, or by the gift of a red apple, or by gifts of oil, can make no difference whatever, *in principle*, because in every case he merely offered an inducement to influence the merchant to do what, under the usage of trade, he had a right to do.

477 In the former case, which for convenience we will call

Holt's case, this Court admitted that the countermand of the order was not criminal, nor the gift of oil in itself criminal,⁷⁵ but the *agreement* between Holt and the merchant to countermand for the purpose of lessening competition was a crime.⁷⁶

In Holt's case, in the course of the opinion, Mr. Justice Shields said:

"He (Love) was bound to know from the nature of this unusual transaction, that the Standard Oil Company, or its representative, had a purpose in giving the oil away; that the purpose was favorable to their own interest; and that the countermand of the order he had given the Evansville Oil Company was a furtherance of that purpose, and would tend to lessen and destroy competition with the oil of the Standard Oil Company then stored and being sold at his place. He had a right, it is true, to countermand the order, if that was the understanding, implied or expressed, between him and the Evansville Oil Company, but he had no right to enter into an agreement with the Standard Oil Company to do it. He lessened competition against the oil of the latter. *Neither* the countermand of the order, nor the giving away of the oil, were *in themselves* criminal, and neither could have been done by the parties acting without

478 *concert*, but they could not *agree* to have the order countermanded in consideration of a *gift* of oil, for the *purpose* of lessening competition, or if such countermand tended to effect that purpose."⁷⁷

As will be observed, the opinion concedes that the countermanding of the order was not, in itself, criminal. According to the usage of trade, Mr. Love had the *right* to countermand the order. For that reason countermanding it could not be criminal.

⁷¹ Trans., p. 352.

⁷² Trans., pp. 352, 353, 286.

⁷³ Trans., pp. 317, 321, 322.

⁷⁴ Ante, p. —.

⁷⁵ 117 Tenn., pp. 657, 658.

⁷⁶ 117 Tenn., p. 653.

⁷⁷ 117 Tenn., 623.

The opinion further concedes that in itself, it was not criminal for the Standard Oil Company to give its oil away to Mr. Love.

The opinion further concedes that neither of the things, innocent in themselves, was possible to be done without the parties acting in "concert." But Love could not possibly have countermanded his order without the knowledge of, and reception of the order by, the Evansville Oil Co., and the Standard Oil Company could not have given oil to Love without his knowledge and acceptance of the oil.

Admittedly the case was one in which the act of Love in countermanding was innocent in itself, in which the act of the Standard Oil Co. in giving oil was innocent in itself, and in which these innocent acts were of such a nature as to require the "concert" of two in order to be done at all.

Nevertheless this act was declared to be a conspiracy against trade, for the reason that the parties *agreed* to have the order countermanded, in consideration of oil, for the *purpose* of lessening competition.

The *agreement* that these things, innocent in themselves, should be done for the *purpose* of reducing competition, was the element which tainted the transaction and made it criminal.

The way in which this bad *purpose* was imputed to merchant Love is revealed in this extract from Mr. Justice Shields' opinion:

"This intent and purpose (of the Standard Oil Company and Holt) were apparent and obvious, and the injurious effect upon trade and the public unmistakable. No intelligent business man could be ignorant of these things. He was bound to *know*, from the nature of this unusual transaction, that the Standard Oil Company, or its representatives, had a *purpose* in giving the oil away; that that purpose was favorable to their own interest, and that the countermand of the order" (etc., as above).

In the *present* case, all these merchants, including Love, were examined by the defendant.

They state that they had no such *purpose* and made no such agreement.⁷⁸

They admit that they had the idea, and presumed that ⁷⁹ Holt's *purpose* was to hit his competitors—to make it unprofitable to the Evansville Oil Company to enter the Gallatin market; but they deny that they entered into or shared that purpose themselves.

This Court did not in Holt's case intimate that there was evidence tending to show purpose and intent on Love's part. The view presented in the opinion is that the nature of this "unusual" transaction was such as that Love was "bound to *know*" that this defendant had a *purpose* in giving the oil away—a purpose "favorable to its own interest." The Court imputed the bad *purpose* to Love, from the fact that it found that he ought to have had *knowledge* of the *purpose* of the Standard Oil Company.

Many years ago this Court recognized the distinction between *knowledge* and *purpose* or intent, and refused to impute a criminal

⁷⁸ Record, pp. 68, 46, 81, 92.

⁷⁹ Trans., p. 67.

purpose because of knowledge, in business transactions; and Holt's case is a departure from that doctrine, without so much as an allusion to the line of cases by which it is established.

Goods were sold by A to B with the *knowledge* that B intended to smuggle them. It was held that the contract was valid, and that A could recover the price.⁸⁰

Tedder purchased a horse from Odum for the purpose of entering the Confederate cavalry service. Odum *knew* that he was 480½ being purchased for that purpose, but the proof did not show beyond the mere fact of such knowledge, that Odum sold the horse to promote the Confederate cause. The contract was held to be valid, and Odum was given judgment for the price to be paid.⁸¹

The evidence shows in *this* case that the Standard Oil Company does not sell to consumers. It sells to retail merchants and dealers only. Consequently the situation was not one in which the Standard Oil Company is charged with combining with other oil companies against its customers, but one in which the charge is that the Standard Oil Company and its *customers* entered into a criminal agreement. To do *what*?

Can anything be more preposterous than the notion upon which the original bill is based, than that these Gallatin merchants would enter into a combination with the oil-producing company, from which they were buying oil, for the purpose of advancing the price which *they* should pay for it?

Can anything be more unreasonable than the proposition that these merchants would enter into a combination for the purpose of excluding a rival producer—for the purpose of so shaping business conditions as that the Standard Oil Company would have no rival?

481 Can anything be more unreasonable than the idea that the Standard Oil Company would *give* oil away to merchants at Gallatin, who were its customers, in order to lessen competition in the sale of the particular oil it *then* had on hand at Gallatin? How could it expect to sell *that* oil if it loaded up its customers with gift oil?

We can understand how the Standard Oil Company might consider it a profitable policy to give away oil for the present, in order to kill out a competitor who was seeking to enter, with the purpose of advancing prices so as to get back again *in the future* when it had a monopoly of the field. *But that is not the charge.* The Attorney-General is most careful to limit the scope of the alleged conspiracy to the particular oil which the Standard Oil Co. *then* had stored in its tanks at Gallatin, Tennessee. It is guardedly alleged that the gifts of oil were made so as to protect the Company from competition in the sale of *that* particular lot of oil.

In Holt's case the Court remarks upon what an "Intelligent business man" (like Love) ought to know. So it is to be remarked

⁸⁰ Cowp., 341; 1 Heisk., 118.

⁸¹ Tedder v. Odum, 2 Heisk., 69. See also Bond v. Perkins, 4 Heisk., 364; Gardner v. Barger, 4 Heisk., 668; Jones v. Bank, 9 Heisk., 455; Puryear v. McGavock, 9 Heisk., 463.

here: How could the Standard Oil Company imagine it would be possible to sell *that* oil to the other merchants of Gallatin, so as to enable them to compete with the four merchants to whom it was selling oil at the same price and giving oil free besides? And how would an intelligent business man come to imagine that it
 482 was to his advantage to combine or conspire with the Standard Oil Company (from which he must purchase if no rivals appeared) to keep other rival companies out?

All this shows that the merchants did not combine and agree with the Standard Oil Company to effect its *purpose* by crushing out competition. The most that can be said, is that which was said in Holt's case—that they, as intelligent business men, must have *known* what the Standard Oil Company's purpose was. A guilty *purpose* on Love's part was erected by the Court on that *knowledge* in Holt's case; but that was done, we respectfully submit, by departing from the principles which this Court has so often applied heretofore, as shown by the cases cited above.

In Holt's case² it was conceded in the opinion that "neither the countermand of the order, nor the giving away of the oil, were in themselves criminal, and neither could have been done by the parties acting without *concert*."

The agreement or concert was, not that the parties thereto would combine and pursue a course of action as against a common rival; they agreed to do reciprocal acts which, *when done*, ended the concerted action. The Court admits that these reciprocal acts were innocent in themselves. It admits that they could only be done by acting in concert. That is, in order for the thing to be done
 483 at all, two parties were required to do it. Criminality cannot therefore be imputed because the action was the action of two instead of one. Innocent or guilty, the act could not be, except as the act of two.

In that case the Court held, and logically, that the transaction was criminal, not so much because of that which the parties did, but because of the purpose with which it was done. It was criminal because it was done "for the purpose of lessening competition." The Court cited for this *State v. Buchanan*, 5 H. & J., 517 (Md.); 9 Amer. Dec. 534. It will be noted, however, that the extract quoted from that case is really upon an altogether different point. The substance of it is, that every conspiracy to do an unlawful act for a bad purpose was indictable at common law, though no overt act should ever be committed. It does not even purport to consider the question whether acts innocent in themselves become criminal when done through bad motives, or for bad purposes. As to that proposition, there is much diversity of opinion. This diversity of opinion is illustrated by two cases decided in Belgium and France. In both cases the plaintiff sued the defendant (who employed regularly a number of workmen) because he threatened to discharge them if they traded with the plaintiff, and thereby kept them from patronizing him.

² 117 Tenn., 623.

In *Riding v. Kroll*, the French case, the plaintiff was a saloon keeper, and the defendant had threatened to discharge his
484 men because the saloon had a demoralizing effect upon them, and rendered it more difficult for him to maintain discipline. The Court held that the defendant was not liable. In *Dapsens v. Lambet*, the Belgian case, the facts were the same, except that the plaintiff was not a saloon keeper, but a store keeper, and a political rival of the defendant, and it was through jealousy and malice that the defendant had threatened his men. In that case it was held that the defendant was liable.⁸³

It will be observed that in both cases there were no combinations. The parties to the cases were individuals; that there was only the threatened loss of trade; and that the workmen were under no obligation to trade with the plaintiff in either case; and that in both cases alike, the defendant could discharge his workmen at pleasure.

In America there is a long line of cases which holds that if a man has a legal right to do a thing, the motive with which he does it is immaterial.⁸⁴ Such is the settled rule in Tennessee.⁸⁵ In that case the agent of the Western & Atlantic R. R. Co. gave orders that any employé who traded with merchant Payne should be discharged. It was malicious, and because he did not like Payne. The men were not employed for any definite time, and the company had the right to discharge them without cause at any time. It was held that
485 the railroad company was not liable; that inasmuch as it had a perfect right to discharge the men at pleasure, for a good cause or bad cause, or for no cause at all, the plaintiff was without redress; that the motive was wholly immaterial. This case was approved in *Pepper v. Smith*, 15 Lea, 551, 556. It so happens that in the present case it is not necessary for the Court to consider which is the sounder view, because the motive or purpose in the present case cannot rightfully be denominated a malicious one. The Standard Oil Company was an oil dealer. At great expense it had established a station and storage tanks and tank wagons at Gallatin, Tennessee. Being in trade it had the right to desire to get all the trade at Gallatin for itself, and to put every rival out of business if it could. It had the right to compete. It was lawful and according to the spirit of commerce and of trade for it to desire, and to purpose, to beat its rivals down. Even the courts that make acts take their color from the motives with which they are done, and condemn that which in itself would be innocent, as criminal, because of the purpose or motive with which it is done, see no harm in remorseless competition—in the attempt of one merchant to take all the trade of another, and thereby break him down. Trade or commerce owes its enterprise to the avarice, the cupidity, the greed, and the pride of man. That is why trade is the soulless thing which it is. There are no altruistic purposes in *trade*. Consequently, when we come to consider acts done *in trade* and business, motive is left out of

⁸³ 18 Harvard Law Review, 417 (1905).

⁸⁴ *Rayercroft v. Tayntor*, 68 Vt. 219; 33 L. R. A., 225.

⁸⁵ *Payne v. R. R. Co.*, 13 Lea, p. 507.

consideration. Certain it is, that one trader may desire and
 486 attempt to get all the business, to starve his rival out, and to
 break him down, and it is not an illegal or improper motive⁸⁶
 The Federal Anti-Trust Law, or Sherman Act, rests upon that prop-
 osition. It contemplates neither the actual motive nor the imme-
 diate effect. If an agreement or combination tends to restrict com-
 petition, it is illegal, whether so intended or not.⁸⁷

Suppose that Mr. Holt had *requested* these four merchants, as
 friends and old customers, to countermand the orders they had
 given, and they had countermanded them, would that have been a
 conspiracy?

Suppose Mr. Holt had said to them, "Countermand the orders and
 I will give you ten barrels of oil at 5 cents a gallon under the regu-
 lar price," and they had countermanded them, would that have been
 a conspiracy?

Suppose Mr. Holt had said, "Countermand the orders you have
 given and I will give you a hundred gallons of oil each"—that, ac-
 cording to the opinion in Love's case, is a "conspiracy." Obviously,
 there is no difference between the cases, and it finally rests where
 the Court put it, not so much upon what was actually done, or the
 nature and terms of the combination itself, as the *purpose* with
 which it was done.

It must be conceded that after the Evansville Oil Company
 487 had gotten the orders from the merchants as purchasers of
 oil, it was not a high-minded thing for Mr. Holt to set about
 inducing them to countermand these orders. This is not the way
 for man to deal with man, even if they are in trade. But it was not
 any worse, morally, for Holt to induce them to countermand the
 oil by gifts of oil than it would have been by entreaty, persuasion,
 or appeals to old friendship—not one bit. The wrong, if any, con-
 sists in this: that when the Evansville Oil Company had gone to the
 expense and trouble of sending salesman Rosemon to Tennessee to
 get orders, and had gotten them, its competitors interposed to in-
 duce the merchants to countermand them. But the morals of trade
 are not the same in all respects as the morals which characterize
 the conduct of man with man. The reason is, that the very life
 of trade is competition—the taking by one man of the business
 which another desires—and the law recognizes and encourages such
 conduct. He must not take the other man's trade by conspiracy or
 combination; but the taking of a *customer*, by fair means or foul,
 whatever it may be, is not a *conspiracy* or *combination*.

In Holt's case the Court appears to have looked to the purpose in-
 stead of the agreement. It denounced the agreement as illegal be-
 cause of the purpose with which it was made. Having said that the
 countermanding of the order and the giving of the oil were in them-
 selves innocent, and that they were things which could only be done
 by concerted action, there was difficulty in pronouncing the agree-

⁸⁶ Eddy on Combinations, sec. 560.

⁸⁷ 125 Fed. Rep., 454, 457.

ment criminal, unless it could be made to take that complexion from a bad motive; and so a bad motive or purpose was imputed. In this way, we respectfully submit, that was made criminal which otherwise could not be criminal.

The error, we respectfully submit, in Holt's case is this: The Court admitted that the countermand of the order was not unlawful in itself. It admitted that the gift of the oil was not unlawful in itself. But the Court said that it was a crime to enter into an *agreement* to contract for the purpose of lessening competition,⁸⁸ and that the *agreement* was one by Love in effect, not to sell the oil of the Evansville Oil Company in competition with that of the Standard Oil Company.⁸⁹ We do not think it can justly be said that the agreement had such far-reaching effect. The most that can be said is that Mr. Love agreed not to take the particular ten barrels of oil he had ordered. He did not bind himself not to sell the oil of the Evansville Oil Company in competition with that of the Standard Oil Company. There was nothing in the contract nor understanding of the parties which forbade Love to put in another order to the Evansville Oil Company, or to buy the ten barrels by a new deal

when the carload arrived from Oil City. Absolutely nothing.
489 Moreover, the Court, in Holt's case, draws a distinction between the gifts of oil by Holt to Love and the *agreement* between them to give and take the oil for the purpose of lessening competition. The Court says that one transaction is innocent, but the other is criminal. We submit that in the nature of things no such distinction can logically be drawn.

It takes *two* to make either a gift or a bargain. Holt could not give oil to Love unless Love consented to accept it; and this made an "agreement." One man cannot make a deal with another without an *agreement*. Consequently the wrong, if there was any, did not consist in the fact that there was an *agreement* between these two, but in the *purpose* to lessen competition on the part of any of the merchants.⁹⁰ All that can possibly be said is that Holt had such a purpose and the merchants *knew* it. So it comes back to the question whether *knowledge* on their part is sufficient to impute a *purpose*.

We have seen from the Confederate cases that it is not.⁹¹ It certainly cannot be sufficient ground upon which to base a criminal *purpose*, when the act in itself is lawful, when the transaction is between merchant and customer, between persons opposed, and across the counter, and when that transaction, innocent in itself, is of such a nature (like a contract, or gift, or sale, or marriage) that it takes *two* to make it at all. The fact that *two* agree to something
490 does not make the agreement a "conspiracy," if that something cannot be done at all, unless *two* do agree to it. Numbers cannot figure as an element of "conspiracy" in *such* a case.

Moreover, the "agreement" did not relate to the oil then stored

⁸⁸ 117 Tenn., 657, 658.

⁸⁹ 117 Tenn., 657.

⁹⁰ Ante, p. 74.

⁹¹ Ante, p. 76.

at Gallatin. It was not intended to destroy competition in the sale of *that* oil. The bill alleges that the agreement related to the particular oil *then* stored at Gallatin. Of course, with that narrow particular averment, proof that the agreement related to oil in general and to come in, in the course of trade in the future, does not establish the case.⁹²

All the witnesses testify that the agreements had no relation whatever to the oil then stored at Gallatin. They knew nothing about the oil, and no time was set for the delivery even of the oil they were to get. It was to be delivered when wanted.⁹³

On this point Mr. Holt said:

"Q. What was the agreement between you and these merchants as to when the oil was to be delivered?

A. Wasn't any; whenever they wanted it, whenever they called for it.

491 Q. Was any particular oil to be delivered to them?

A. Oh, no; no particular oil.

Q. What I mean to ask you is whether that oil then at Gallatin, stored in the tank, was to be delivered, or any other oil?

A. No, sir; for we might have put new tank of oil in there the next day. We didn't know when oil was coming to Gallatin. He might have gotten a new tank in the next day, and he would have been given that the same.⁹⁴

* * * * *

Q. And they traded with you?

A. Yes, sir.

Q. And in that way you were protecting your trade, and the oil you had stored there at Gallatin, from the Evansville Oil Company?

A. Not necessarily the oil there in Gallatin at the time. It came in any old time; we didn't know when it was coming in Gallatin.

Q. It did protect the oil you had stored there?

A. Yes, sir.

Q. And it was done for that purpose, wasn't it?

A. Yes, sir.

Q. Now, you don't know how much oil you had stored there at that time?

A. No, sir."⁹⁵

492 The Company had three storage tanks at Gallatin with a capacity of 370 barrels in all.⁹⁶

Oil was being sold out, and new oil put in, all the time.⁹⁷ It appears that October 1, 1903, there were 15,363 gallons in the tank at Gallatin, and 9,529 gallons December 1, 1903.⁹⁸ It does not appear that there was any oil there October 12, 1903, when the orders were

⁹² Pickle, 65; 101 Tenn., 271; 105 Tenn., 415; 39 L. R. A., 499; 108 Tenn., 584.

⁹³ Love, qq. 71-75, p. 47; qq. 167-70, p. 54. Lane, qq. 92-6, p. 63; q. 228, p. 72; q. 218, p. 71; q. 144, p. 66; q. 54, p. 60. Hunter, q. 43, p. 92; q. 67, p. 94; q. 81, p. 80; q. 90, p. 91. Cron, q. 93, p. 81; q. 157, p. 85.

⁹⁴ Trans., p. 320.

⁹⁵ Trans., p. 333.

⁹⁶ Trans., p. 241.

⁹⁷ Trans., p. 333.

⁹⁸ Trans., p. 241.

countermanded. Evidence that there were 15,363 gallons on hand October 1 is not evidence that there was any oil on hand October 12, 1903. There *might* have been a good deal, or there *might* have been none. That there was oil on hand November 1 is no evidence that there was oil October 12, for it was being shipped in all the time.

For these reasons we submit that upon the evidence in *this* record, that which happened at Gallatin was not a conspiracy against trade, even as between Holt and the merchants. In Holt's case it was found that he was guilty on the evidence in that record. This Court said:

"These facts are all involved in the verdict of guilty against Holt, and as the evidence does not preponderate against the finding of the jury, they must be considered as established, *for the purposes of this case.*"⁹⁹

493

V.

The contract with the Cassety Oil Company was not a conspiracy against trade nor a violation of the anti-trust act of Tennessee.

The contract with the Cassety Oil Company was not illegal. In effect, it constituted that company an *agent* for the Standard Oil Company at Nashville. Oil was a small part of the Cassety Oil Company's business—not 25 per cent.¹ It had gotten to the point that that company had great difficulty in getting oil to sell from others than the Standard Oil Company.² It had "mighty little oil trade left."³ It was a mere dealer without refineries behind it. Its oil business had "dried up practically."⁴ That was the situation when the contract was made. It was understood to be the establishment of an agency,⁵ and counsel advised that it was legal.⁶

The contract was made at Cincinnati, by a Kentucky corporation with a Tennessee corporation, for the sale of the former's oil by the latter as agent at Nashville, Tennessee.⁷ The oil was to be shipped by the Standard Oil Company in tank cars from points outside of Tennessee, to Nashville, Tennessee, for sale there.⁸

Mr. Cassety admits that the public generally supposed the Cassety Oil Company to be a branch of the Standard Oil Company.⁹

The contract was not only one of mere agency, and therefore lawful, but it was one of interstate commerce, and, therefore, if unlawful, not a violation of the laws of Tennessee. However, it violated no law whatsoever. It did not bind the Cassety Oil Company not to deal in oil of other companies, and if it had, nevertheless the agency would have been lawful.¹⁰

⁹⁹ 117 Tenn., 659.

¹ Trans., q. 69, p. 203.

² Trans., qq. 171-4, p. 186; q. 47, p. 177.

³ Trans., q. 31, p. 199.

⁴ Trans., q. 18, p. 198.

⁵ Trans., p. 366.

⁶ Trans., q. 148, p. 210; q. 123, p. 208.

⁷ Trans., qq. 109, 113, p. 207; p. 369.

⁸ Trans., q. 117, p. 207; q. 95, p. 180.

⁹ Trans., q. 161, p. 185; q. 248, p. 191.

¹⁰ Walter A. Wood Mow. & Reap. Machine Co. v. Greenwood Hardware Co., 75 So. Car., 378; S. C., 9 L. R. A. (N. S.), 501; 55 S. E. Rep., 973. Kevill v. Standard Oil Co., 8 Ohio N. P., 311; S. C., 9 L. R. A. (N. S.), 449, note.

VI.

Even if the transaction between Holt and the merchants was criminal, and a conspiracy against trade, or between them, the Standard Oil Company was not implicated, for the reason that Holt's action was without authority, and was promptly disavowed upon discovery.

As Rutherford was acquitted, he will be left out of consideration.

Assuming, for argument, that Holt was guilty of a conspiracy against trade, the Company can be inculpated only by holding it responsible for salesman Holt's acts. To inculpate the Company it must appear either that Holt was authorized to do what he did, or that some officer of the Company in authority, or managing agent, subsequently approved of it.

A corporation cannot, *in fact*, enter into a conspiracy. This has often been held. The reason is that it is a legal concept, an *artificial* being without animate body or mind, and incapable of having that specific *intent* so essential to crime.¹¹ Nevertheless, it is now held by many courts, and correctly, that a corporation may be punished for the crime of conspiracy. While this is true, the rule does not rest upon any notion of actual guilt. No amount of reasoning can prove that a corporation can *actually* intend to commit a crime. The rule rests upon grounds of *public policy*. To illustrate: a corporation, for jurisdictional purposes, is a "citizen" of the State by which it was created, although it may be that not a stockholder lives in that State. This rule is obviously based upon policies deemed essential to the administration of justice.

So it is with conspiracy. Everybody knows that the legal concept called a corporation cannot enter into a conspiracy in point of fact; but at the same time it is not to be denied that upon grounds of public policy a corporation ought to be held guilty of a conspiracy to commit offenses, whenever those managing agents who can and who do think, and will for it, to conspire to use the power of the corporation to commit these offenses, in order to advance the corporate interests. Corporate guilt can, therefore, upon grounds of public policy, be worked out and imputed in a logical way. It is this: Speaking generally, in order to guilt in any given case, there must be (1) the wicked purpose, (2) and the intent to do the forbidden act, whereby that wicked purpose is accomplished. A corporation can have neither the wicked purpose, nor the intent to do the forbidden act, whereby that wicked design is reached; but its managers can have both. Whenever the case is one in which the agents of the corporation enter into a conspiracy to do certain prohibited acts, in order to advance the interests of the corporation, it may, upon grounds of public policy, be proper to impute this intent of the agents to the corporation—to establish the rule in such case, that that kind of intent, viz.: the mere intent to conspire to do the forbidden act, shall suffice, and will be imputed to the corporation itself, as evidence of the underlying and ultimate wicked design.¹²

¹¹ See *State v. Great Salt Works M. & M. Co.*, 20 Me., 41.

¹² *U. S. v. John Kelso Co.*, 86 Fed. Rep., 305, 306.

But while, upon grounds of public policy, this secondary intent of the agent will be *imputed* to the *inanimate* corporation as a wicked design, so as to make it *criminally* liable, in order that no injustice may be done by this fiction, it is essential that these "agents" shall

be *managing* agents—agents who *do* think, and will, and
 497 manage for the corporation, upon which the punishment is to be inflicted. *There are agents, and agents.* The Standard Oil Company, like other corporations, has one class of agents which consists of its directors and principal officers. These control its policies and affairs. Below, there is another class of agents called general agents, who manage the special agents throughout the territory in which it operates. These special agents have charge of districts. Mr. Comer was one who had charge of the Nashville District. Underneath these special agents are local agents in charge of station tanks, etc., and salesmen who sell to the "trade," and coopers who barrel the oil, and drivers who drive the tank wagons and deliver the oil to customers. All these are "agents" of the corporation in a general sense, but they are divisible into two classes: (1) Those who *manage* the *affairs* of the Company, and *think* for it. (2) and those who attend to its *business* and do the work—merely obeying the orders which come to them.

Obviously, if the intent of an agent is to be *imputed* to a corporation for the purpose of convicting it of *criminal* conspiracy, that agent ought to be a *managing* agent—an agent who manages its affairs, and not merely one who attends to some of its business.

A natural person can act in person or by agent, but a corporation can act only through an agent. It *must* act through an agent, if it act at all. Indeed, it cannot act through an agent. The
 498 agent acts *for* it. A man can no more walk without legs than a corporation can act without agents. For this reason *every* agent of a *corporation* occupies *two* relations to his principal. He is an agent in the sense that he is the representative—in the sense in which every agent is the representative of his principal. He is also agent in the sense that he is a mere instrumentality—the instrument through which his principal (called a "corporation") *must* act if it acts at all.

Now, as it is not possible for any corporation to commit a crime, and as corporations are (very justly) held responsible for the crimes of their managers committed in furtherance of the corporate business; inasmuch as upon grounds of public policy the crime of the agent is *imputed* to the corporation, in all fairness and justice the corporation ought not to be held criminally liable unless the guilty agent is a *managing* agent, or unless the conduct of the agent when he is a mere subordinate employee has been approved by a managing agent. Any other doctrine would put corporations at the mercy of their employees.

How was it in the present case? Mr. Collings, the Vice-President at Cincinnati, was the principal manager. He alone fixed prices.¹³ No person under him, not even a special agent, had any authority in that respect.¹⁴

¹³ Trans., p. 352.

¹⁴ Trans., pp. 352, 284.

Mr. Holt was a traveling salesman. He had no authority whatever over the affairs of the Company.¹⁵ He had no authority over a local agent.¹⁶ He had no control over prices and could only sell oil at the prices given to him by the special agent, who, in turn, received these prices from Mr. Collings, the General Manager.¹⁷ He had no authority to change prices, or to give away oil, as he well knew.¹⁸ In this instance, the first and only one in his life, he gave away the oil,¹⁹ and concealed the fact as long as he could.²⁰ It was concealed from his superior until December 23, 1903, when Mr. Comer, having gotten information through Mr. Wilson that this had been done, made prompt inquiry as to the fact.²¹ The correspondence set out on page 21 hereof also shows that Holt had no authority, and that the Company had no knowledge of what he had done. Upon no principle of justice, or public policy, ought the corporation to be held criminally liable for this act of this subordinate agent or employee.

If, however, those in authority subsequently approved of his conduct, the case would be different.

Undeniably the general rule is that a master is not *criminally* liable for a *criminal* act upon the part of his servant, unless he in some way participates in, countenances, or approves the act.

Commissioner v. Stevens, 153, Mass., 421.

500 *Mitchell v. Mimm*, 8 Texas, 6.

Hipp v. State, 5 Blackf. 149; 33 Am. Dec., 463.

Noll v. State, 34 Ala., 262.

Rex v. Higgins, 2 Lord Raymond, 1547.

In that case the Company should be held liable the same as if it had directed him to do it in the first instance. But what are the facts? It was not discovered by Mr. Comer until December 23, 1903, nor by Mr. Collings until December 26, 1903. Mr. Comer promptly inquired into it of both Holt and Rutherford, and disapproved and condemned it, and made Rutherford pay for the oil. Mr. Collings as promptly inquired into it of Mr. Comer, and when informed, as promptly condemned and disapproved it, and directed Mr. Comer to charge the agent with the oil, not knowing that Mr. Comer had done so three days before.

Mr. Holt was not discharged. He was sharply reprimanded, with-out more. He was young, had been a faithful salesman, and had never done anything of the kind before. What he did was in a mistaken zeal to serve the Company, and although it was reprehensible, no one connected with the Company, as agent or counsel, considered the act criminal.

Mr. Collings' view of the matter was thus expressed in his letter to Mr. Comer: "If I did not know that Mr. Holt acted in the matter

¹⁵ Trans., pp. 285, 213.

¹⁶ Trans., p. 213.

¹⁷ Trans., pp. 214, 315, 317.

¹⁸ Trans., pp. 317, 321, 352.

¹⁹ Trans., pp. 321, 327.

²⁰ Trans., pp. 319, 230.

²¹ Trans., p. 323.

with the best intentions in the world, I would insist on dis-
 501 charging him."²² Nevertheless, Mr. Comer deemed it good
 policy to keep Mr. Holt on "tender hooks" for awhile.²³ He
 told him he would write to Mr. Collings, and that he might be dis-
 charged.²⁴ Holt pleaded that he liked the work and did not know
 how to do much of anything else.²⁵ Later Comer told him that Mr.
 Collings was not right sure what ought to be done to him.²⁶ The
 correspondence between Mr. Comer and Mr. Collings (ante, p. 21)
 shows how ignorant they were of the transaction, and how promptly
 it was disapproved by both of them.

For these reasons we confidently submit that even if Mr. Holt and
 the merchants were guilty of a criminal conspiracy, the Standard
 Oil Company was not. Upon the facts (which are not even disputed
 by a single witness) the guilt of Mr. Holt cannot be imputed to the
 Company.

Upon the facts, the Company is not guilty of any offense.

VII.

*This prosecution is barred by the statute of limitations. It is
 barred by the statute of one year.*

The act upon which this bill is based is not an act prescribing the
 terms on which foreign corporations may enter the State.
 502 This bill is not brought to exclude the defendant from Ten-
 nessee upon the ground that it had failed to comply with the
 laws relating to the admission of foreign corporations.

The Act of 1903 is not an act prescribing the powers of corpora-
 tions. The present case is not one in which a corporation is being
 proceeded against for misuse, or abuse of corporate powers—for
 some sin against the law of corporate being. The defendant has the
 undoubted power to sell its oils or to give them away.

The Act of 1903 is a *general criminal law*, relating to persons and
 corporations equally and alike. It is a general criminal law, mak-
 ing certain agreements, by whomsoever made, conspiracies against
 trade—crimes in Tennessee.¹⁷ "The only distinction made in the
 statute between natural persons and corporations violating its provis-
 ions is in the *punishment* provided."²⁸

The offense, whenever this statute is violated, is a "conspiracy
 against trade." "Any violation of the provisions of this act shall be
 deemed, and is hereby declared to be, destructive of full and free
 competition, and a *conspiracy against trade*," etc., is the language
 of the act. This act is one which not only forbids something, and
 makes a violation of its provisions a crime, but it defines the
 503 crime, and states what that forbidden something is. It is a
 "conspiracy against trade."

²² Trans., p. 357.

²³ Trans., p. 340.

²⁴ Trans., p. 322.

²⁵ Trans., p. 322.

²⁶ Trans., p. 340.

¹⁷ Acts 1903, ch. 140.

²⁸ 117 Tenn., 664.

Authorities need not be cited to show that a conspiracy against trade was a misdemeanor only, and not a felony, at the common law. By the Code, a conspiracy against trade is expressly made a misdemeanor.²⁹ Reading the Code and the Act of 1903 together, as all acts in *pari materia* must be read, the offense committed in violating the Act of 1903 is a misdemeanor.

In 1873, an act was passed "to regulate the practice in civil and criminal cases." That act is section 7185 of the Shannon Code. For the purpose of that practice-act, it provides that a "felony" shall be an offense punished by death or imprisonment in the penitentiary, and a "misdemeanor" an offense punished by fine or imprisonment in jail. It also provides that in all felony cases every word of the Judge's charge shall be in writing. This is simply a practice act. It classifies offenses only for purposes of practice. It does not even assume to grade crimes as offenses under the body of the criminal law. Therefore, in determining whether any given offense is a felony or a misdemeanor in the criminal law, this practice act is of no importance.

But if it were applicable, no aid could be derived from it in the present case. Under the Anti-Trust Act of 1903, persons 504 may be either fined or imprisoned in the penitentiary. That punishment which would make the offense a misdemeanor may be inflicted, and that punishment which would make it a felony may also be inflicted, upon natural persons. Consequently, it is not possible for the statutory definition to be applied to cases arising under this act. Take Mr. Holt's case: He could have been imprisoned in the penitentiary, or he could have been fined. In point of fact, he was not imprisoned, but fined. Was he guilty of a felony? Is he infamous?

And with respect to corporations, the case is more difficult, inasmuch as they can neither be fined nor imprisoned. A punishment which is not mentioned in the practice-act of 1873,³⁰ is the only punishment that can be inflicted upon them.

It follows that even if the Act of 1873 were not a mere practice-act, but one of substantive criminal law, it would not be applicable to violations of the Anti-Trust Act of 1903. And it also follows that violations of that act must be what the act expressly says they shall be—"conspiracies against trade"; and that conspiracies against trade are what the Code says they are—misdemeanors merely, and not felonies.

The prosecution of misdemeanors, unless it be otherwise expressly provided, is barred in twelve months.

505 The statute of limitations began to run when the agreement was made and entered into.

U. S. v. Owen, 32 Fed. Rep., 534.

U. S. v. McCord, 72 Fed. Rep., 159.

Ex parte Black, 147 Fed. Rep., 832.

U. S. v. Briggs, 157 Fed. Rep., 264.

U. S. v. Irvine, 98 U. S., 450.

Commonw. v. Bartilson, 85 Penn., 482.

Ins. Co. v. State, 75 Miss., 24; 22 So. Rep., 99.

²⁹ Shann. Code, secs. 6736, 6603, 6604.

³⁰ Shann., 7185.

The offenses alleged in the bill were committed several years before this bill was filed. If Mr. Holt had not been indicted until March, 1907 (when this bill was filed), undeniably he could have successfully pleaded the statute of one year. Assuredly the corporation can do the same thing, *unless* by some curious reasoning it can be maintained that the fact that a different *kind* of punishment is inflicted on corporations which for that reason deprives them of the benefit of the statute of limitations altogether. This Court has already said that the *only* difference made by this act between natural persons and corporations is in the *punishment inflicted*.³¹ Shall it now be said that there *is* another difference; that persons may plead the statute of limitations, but corporations shall not have the benefit of the statute at all?

In truth, if a difference be made at all, it should be made in favor of corporations. To illustrate again with Mr. Holt: He could
506 have been fined \$100, or he could have been fined \$5,000; or he could have been imprisoned one year in the penitentiary, or he could have been imprisoned ten years. Great latitude is given by the act in dealing with persons, so as to temper the punishment to the offense. Everybody knows that offenses differ in gravity. Hence the latitude given to the jury. No such fairness or justice is shown to corporations.

So far as the punishment is concerned, it is all one with respect to foreign corporations whether the offense be a felony or a misdemeanor. While natural persons who infract this statute are justly punished according to the circumstances of the case, by penalties running from a fine of \$100 to a fine of \$5,000, or imprisonment in the penitentiary for a period of from one to ten years, no such discrimination is shown with respect to corporations. Although corporations can do nothing wrong themselves, and must act wholly through natural persons as agents, and the wrongs of *these agents* are *imputed* to the corporations, and although they are held to engage in conspiracies solely because their agents have engaged in them, and although the circumstances of any particular case may be considered in the cases of the agents or natural persons themselves, the violations of law *imputed* to the corporations, by reason of the acts of these same agents, are punished with the *same* severity in *all* cases. So far as they are concerned, there are no mitigating circumstances to temper the punishment for their *imputed* conspiracies against trade. The offenses, so far as they are con-
507 cerned, have no degrees. Although the agent who entered into the conspiracy, and by his acts put the corporation in it, may be fined only \$100, the corporation is punished by this act the same as if that agent had deserved and received imprisonment in the penitentiary. The punishment of the corporation is the same whether the offense be called a felony or a misdemeanor.

The Attorney-General will probably repeat what he said on the trial below—that this is not a criminal case, but a “civil proceeding in equity.” But that seems to us to be no real answer at all. The procedure by which the Company is sought to be punished is a bill

³¹ 117 Tenn., 664.

in equity in *form*, but the *offense* for which punishment is sought to be inflicted is a *crime*—a violation of a general criminal law, a conspiracy against trade. The fact that the *method* adopted to punish corporations is different from that employed to punish persons, cannot deprive corporations of the defenses which the general law says all accused persons shall enjoy. The *offense* is the same whether committed by persons or corporations, and the defenses ought to be the same. Indeed, any law which deprived corporations of such defenses would be void as depriving them of the equal protection of the laws. Suppose (to illustrate) that this statute had punished corporations and persons equally and alike by fine from \$100 to \$10,000, and had expressly provided that prosecutions against persons should be limited to one year, as in the case of other misdemeanors, but prosecutions against corporations should not be

508 limited at all, does any one doubt that this would be arbitrary legislation, and a denial of the equal protection of the laws? Nor can this injustice be done by indirection. That the annihilation of a corporation is to be accomplished by a *bill* in equity, for the *crime* of violating the general criminal law, instead of by indictment, cannot affect or alter the *nature* of the case. The crime is the same, the offense is the same, and the defenses must be the same under the Constitution, whether the charge be in the form of a bill or in the form of an indictment. When the liberty and property of persons, natural or artificial, are involved, courts consider substance and not form. But if form *be* considered, inasmuch as this bill is brought to *punish* for a crime, there is nothing in the way to prevent the pleading of the statute. Is there any solemn mystery about a *bill*? Is an accused person to be deprived of defenses because the accusation may be in the form of a bill in equity? It has generally been supposed that the doors of equity were even *wider* than those of the law. This bill was brought expressly to *punish*. It so says on its face. "This bill is brought by the complainant, through his Attorney-General, as aforesaid, in order that the *punishment* of such violations prescribed by section 2 of said act may be *imposed* upon said defendant Company," is the language of the bill itself.²²

A violation of the Anti-Trust Act of 1903 is a *crime*—a conspiracy against trade. Conceding (for the present) that the
509 Legislature may authorize such crime to be punished through any desired form of procedure, and in any court of law or equity upon which it may see fit to confer jurisdiction, it must, nevertheless, remain true that the constitutional rights of the accused must be respected equally and alike in all tribunals, and the equal protection of the law in all matters of defense secured to him.

Certain it is that no judicial construction of a statute is to be expected which will deprive one accused of *crime* under a general law, of a defense in a court of equity, which can be interposed in a court of law. Courts of equity were established in order to give relief in cases where it is refused by courts of law. Surely that rule is not to be ignored when courts of equity are used to inflict the punishment which a statute prescribes for crime.

²² Trans., p. 4.

In *Kirkman v. Phillips*, 7 Heisk., 225, this Court said that "the statute of limitations depends upon the *nature and character* of the action, and not upon its *form*."

In *Boyd v. United States*, 116 U. S., 616, an information was filed by the District Attorney to forfeit certain property for a violation of the revenue law. The statute provided for fine and imprisonment, and also for forfeiture of the goods. The proceeding, civil in form, was brought to forfeit the goods. An effort was made to compel the defendant to produce his books and papers, but he resisted on the ground that it was really a "criminal case"; and it was so held.³³

510 Whenever a punishment is prescribed by law for an offense committed, it cannot be inflicted but by indictment, or presentment.³⁴

The Act of 1903 should have provided for the indictment of corporations. This Court has already decided that it does not.³⁵ But the fact that it has failed to do so does not nullify the Constitution. That fact does not authorize the Legislature to put the defendant to answer a criminal charge by bill in equity. It follows that this proceeding is absolutely void.

The objection, should it be made, that this foreign corporation was absent from the State, and that the statute was thereby suspended, can have no force, for the reason that the defendant was not absent, within the meaning of section 4455 of Shannon's Code. It has done business in Tennessee and at Gallatin continuously since the alleged offense was committed. It has maintained agencies at Nashville and at Gallatin all the time. The agent at Gallatin is known as a "local agent," and is the same agent against whom process issued and was served in this case. There has not been a time in which the Company, through this "local agent," could not be found doing business at Gallatin, Tennessee, and Nashville. It has not been absent from the State within the contemplation of that statute.³⁶

511

VIII.

The defendant cannot be proceeded against for a violation of the Anti-Trust Act of 1903 by bill in equity in the first instance. Not until it shall have been put to answer the charge by indictment or presentment, and convicted thereunder by a jury, can a bill in equity upon the relation of the Attorney-General be maintained to oust it from Tennessee; and if it be the meaning of that act that the procedure shall be otherwise than as above stated, and that bills of the character of the bill in this case may be maintained, the act is to that extent unconstitutional and void.

The Constitution of Tennessee provides that no person shall be put to answer any criminal charge but by presentment or indict-

³³ 116 U. S., 639. (See also *Iowa v. Chicago R. & Q. R. R.*, 37 Fed. Rep., 497.)

³⁴ *Sevier v. Washington Co.*, Peck, 339, 362.

³⁵ 117 Tenn., 618.

³⁶ *Truscott v. Railroad*, 101 Tenn., 102; S. C., 70 Am. St. Rep., 661.

ment; that the right of trial by jury shall remain inviolate; and that no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land.

If the charge made in the bill against the Standard Oil Company is a "criminal charge," or if the corporation is a "person" or a "man," within the contemplation of the Constitution, it is obvious that the present bill cannot be maintained. If such be the case now in hand, it matters not that the Act of 1903 authorizes this bill. The Legislature cannot authorize that which the Constitution forbids.

512 Consequently, the inquiry arises: Is this a "criminal charge," and is a corporation a "person," or a "man," within the meaning of the Constitution of Tennessee?

The Act of 1903, the Anti-Trust Act, says that it shall be a criminal conspiracy against trade for any person or corporation to enter into an agreement to lessen competition, or to enhance the price of merchandise to consumers, and that persons guilty of this offense shall be fined or imprisoned, and corporations guilty of the offense shall be dissolved or ousted, accordingly as they are domestic or foreign corporations. The act prescribes different punishments, but the offense is the same, and committable by both corporations and persons alike.

The law is a general criminal law. The offense is a criminal conspiracy against trade.³⁷ The violation of this act is made a crime. Necessarily the charge that it has been violated is a criminal charge. The result is that, under the Constitution of this State, a corporation cannot be put to answer such a charge otherwise than by presentment or indictment, *unless* it can be successfully maintained by Mr. Attorney-General that a corporation is not a "person" in the constitutional sense; for that instrument declares that no person shall be put to answer any criminal charge except by presentment, indictment or impeachment. It has been held that when the offense is a misdemeanor merely, the right of appeal to

513 a superior jurisdiction, where a trial by a jury is preserved, it is not the denial of any constitutional right to try without a jury in the inferior tribunal in the first instance.³⁸

The fact that the punishment prescribed is ouster, instead of fine or imprisonment, cannot affect the nature of the charge, nor the criminality of the offense. In *Coffey v. Harlan County*, 204 U. S., 659, it appears that a statute of Nebraska provided that any public officer guilty of embezzlement of public money should be imprisoned in the penitentiary, and pay a fine equal to double the amount he had embezzled, the fine to operate as a judgment, for which execution should issue, for the use of the persons whose money had been embezzled. It appears further that one Whitney was Treasurer of Harlan County, Nebraska, and that he embezzled \$11,190. He was found guilty, sentenced to imprisonment, and to "pay a fine in the sum of \$22,380, double the amount of the embezzlement."

³⁷ Acts 1903, ch. 140, sec. 3.

³⁸ 8 Yer., 496; 9 Yer., 417.

The Court held that it was immaterial whether he had made restitution in whole or in part, and that it was not important what the *penalty* was called, inasmuch as it came to him as the result of his crime.³⁹

In the course of the opinion in that case, Mr. Justice Moody said:

514 "As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine is called a penalty, a punishment, or a civil judgment. Whatever it is called, it comes to the convict as the result of his crime."

So here: Dissolution of the offending corporation, if it be a domestic one, or ouster, if it be a foreign one, comes to the corporation offending against the Act of 1903, as the result of its crime. It is not of the slightest importance whether that result be called a civil judgment, or a penalty, or a punishment. It is not of the slightest importance whether that punishment be a fine, or imprisonment, or ouster, or dissolution. It comes to the offender as a result of the crime. The conduct on account of which it comes is a violation of a general criminal law, and necessarily the accusation is a "criminal charge" within the meaning of the Constitution of Tennessee. The charge is the same against corporations and natural persons alike. Undeniably, neither Mr. Holt nor Mr. Rutherford, nor any of the four Gallatin merchants, could be put to answer this charge otherwise than by presentment or indictment. If the Act of 1903 had have provided any other procedure as to them, it is obvious that it would have been unconstitutional and void. A corporation is a person, and is as fully protected by that instrument as are natural persons.

515 The Constitution provides that no "man's" property shall be taken or applied to public use without just compensation being made. It has already been determined that a corporation is a *man* within the meaning of this clause.⁴⁰

The Constitution of Tennessee provides that no man shall be deprived of life, or property, but by the judgment of his peers, or the law of the land. The Constitution of the United States provides that no State shall deprive any person of liberty or property without due process of law, or deny to any person the equal protection of the laws. It has already been determined that a corporation is a "*man*" and a "*person*" within the meaning of these provisions.⁴¹

"Liberty" and "property" include the right to contract and to use one's faculties in all lawful ways, to live and to work where one chooses, and to pursue any lawful trade or business.⁴²

The Constitution of Tennessee provides that no person shall twice

³⁹ 204 U. S., 664.

⁴⁰ 22 Pickle, 267.

⁴¹ Harbison v. Knoxville Iron Co., 103 Tenn., 429; Insurance Co. v. Craig, 106 Tenn., 624; Duggett v. Insurance Co., 95 Tenn., 250; Charlotte, etc., R. R. Co. v. Giles, 142 U. S., 386.

⁴² Harbison v. Knoxville Iron Co., 103 Tenn., 429; Dugger v. Ins. Co., 95 Tenn., 252.

be put in jeopardy of *life or limb*. One convicted of a *misdemeanor* is not put in jeopardy of his life nor of his limbs. No man
 516 can ever be put in jeopardy of his limbs in this country, because cruel or unusual punishments cannot be inflicted. Yet no man can be convicted twice of a misdemeanor any more than of a felony. The Constitution therefore does not mean what it literally says. It means that no man shall be tried twice for the same offense.⁴³

It cannot be convicted twice for the same offense.⁴⁴

When it is perceived that all the clauses in the Bill of Rights which safeguard liberty and property and secure justice, have uniformly been construed to include corporations or artificial persons, it cannot be doubted that the clause relative to indictments and presentments will be construed the same as its fellow-clause, and that it will be held that the word "man" in the clause referred to includes corporations. Consequently when the Constitution says that no "man" shall be put to answer any criminal charge by indictment or presentment, it means that no man, woman, child or corporation can be put to answer a criminal charge in any other way.

In dealing with constitutional questions affecting personal and property rights, the Court construes them broadly and not in a technical way. To illustrate: *In ex parte Garland*, 4 Wallace, 333, it appeared that Mr. Garland, of Arkansas, had been admitted
 517 to practice in the Supreme Court of the United States in 1860, and of course had then taken an oath to support the Constitution of the United States. During the Civil War he entered the Confederate service. In 1865, Congress passed an act to the effect that no person should be allowed to practice in the Federal Courts without making oath that he had not voluntarily borne arms against the United States. Mr. Garland, of course, could not take that oath. The President pardoned Mr. Garland for all offenses as a rebel. He presented this pardon and asked to be permitted to practice in the Supreme Court without taking the oath of 1865. The application was resisted on the ground that while the pardon protected him from punishment for what he had done as a rebel during the war, the oath was another matter—that it regulated and prescribed the *qualification* of members of the *bar*, and therefore was not covered by the pardon. But the Supreme Court held that the pardon operated to relieve him from taking the new oath. Mr. Justice Fields said:

"As the oath prescribed cannot be taken by these parties, the act as against them operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions, or any of the ordinary vocations of life for past conduct can be regarded in no other light than as *punishment* for such conduct."⁴⁵

⁴³ *State v. Hornsby*, 8 Robinson, 554; 41 Amer. Dec., 305, 311 (La.).

⁴⁴ 142 U. S., 386.

⁴⁵ 4 Wall., 377.

Mr. Jefferson Davis was indicted at Richmond, Va., for treason during the Civil War. While the indictment was pending, the Fourteenth Amendment to the Constitution was adopted. Among other things, it provides that no one who had previously taken an oath to support the Constitution of the United States as a Senator or member of Congress, and thereafter engaged in the rebellion, should be eligible to be a Senator or Representative in Congress, or to hold any office. Mr. Davis had been a Senator before the war. Mr. Davis' counsel moved to quash the indictment on the ground that when the Fourteenth Amendment prescribed this particular disqualification, it in effect relieved from *all other* penalties and disqualifications; that by inflicting this particular punishment for having engaged in the rebellion, by *implication*, all other forms of punishment were forbidden. The question was argued by such lawyers as Mr. O'Connor and Mr. Evarts. Chief Justice Chase, who sat in the case, and District Judge Underwood divided in opinion; and so the question was certified to the Supreme Court. *But the Chief Justice was of the opinion that the motion was well taken and that the indictment should be quashed.*⁴⁶

No narrow view was taken of the question in either case. No narrow view should be taken here. When the Anti-Trust Act of 1903 makes it "a conspiracy against trade" to enter into an agreement of a certain character, and punishes *persons* who are guilty by fine and imprisonment, and *corporations* that are guilty by dissolution or ouster, the *offense*, so far as corporations are concerned, must be regarded as a criminal offense, and the charge as a criminal charge, the same as in the case of natural persons. A corporation cannot be imprisoned in the penitentiary, but it can be fined. The Legislature, however, preferred to punish corporations for offending this act, by dissolution or ouster, rather than by fine. That, however, does not alter the nature of the charge. It is a criminal charge, and the punishment comes, as stated by Mr. Justice Moody, as the result of crime. Being a criminal charge in truth and in fact, the Legislature is not at liberty to authorize any other form of arraigning, or of punishing the corporation *than that* which the Constitution prescribes and requires. The Constitution requires an indictment or presentment, and declares that no person shall be put to answer any *criminal charge* save by indictment or presentment. It follows that the Act of 1903, inasmuch as it provides that a corporation may be put to answer the charge of violating its provisions, and be punished therefor by *bill in equity*, upon the relation of the Attorney-General, is unconstitutional and void.

It is no answer to say that a jury may be called for in the Chancery Court. The so-called right of trial by jury, which the statute permits in the Court of Chancery, is not a constitutional right, but a statutory one purely.⁴⁷

Moreover, in the Court of Chancery, the jury merely responds to certain issues. It does not try the case.⁴⁸

⁴⁶ Fed. Cases, No. 3621, *a*.

⁴⁷ *Marler v. Wear*, 96 S. W. Rep., 444; 117 Tenn., 243.

⁴⁸ *Connor v. Freirson*, 14 Pickle, 183; *Gass v. Mason*, 4 Sneed, 506; *Ragsdale v. Gossett*, 2 Lea, 730.

520 The result is, under the interpretation placed upon the Act of 1903 in Holt's case, it is unconstitutional and void, and the present bill cannot be maintained, for the reason that the defendant Company cannot be put to answer this criminal charge otherwise than by presentment or indictment.

IX.

The transactions complained of are transactions of interstate commerce and (if they be unlawful) are violations of the act of Congress, and not of the statute of Tennessee; and for that reason the State Court has no jurisdiction to proceed against defendant in the present case.

"Commerce" includes not only traffic, but every species of commercial intercourse among the States.⁴⁹ It includes intercourse for the purposes of trade in any and all its forms.⁵⁰

A commercial transaction between citizens of different States is interstate commerce, whether conducted by the principals exclusively or in part by the agency of another.⁵¹

No State has the power to regulate interstate commerce.

State v. Scott, 98 Tenn., 260.

521 The power of Congress is exclusive whenever the subjects are general in character or admit of only one uniform system or plan of regulation.

Robbins v. Shelby Co., 120 U. S., 492; *State v. Scott*, 98 Tenn., 260.

As said by the Supreme Court of the United States in *Crutcher v. Kentucky*, 141 U. S., 47, 62:

"The decisions are clear to the effect that neither licenses, nor indirect taxation of any kind, nor any system of State regulation can be imposed upon interstate commerce, any more than upon foreign commerce; and that all acts of legislation producing any such result are to that extent unconstitutional and void." (141 U. S., 47, 62.).

The omission of Congress to make regulations with respect to such subjects indicate the intention that they shall be free from all restrictions or impositions by any State.

Leisy v. Hardin, 135 U. S., 109.

State v. Scott, 98 Tenn., 257, 260.

Schollenberger v. Penna., 171 U. S., 23.

But Congress has acted; it has legislated with respect to combinations, conspiracies, trusts, and agreements to lessen competition in interstate commerce or trade. The "Sherman Act" of 1890⁵² is as broad and sweeping as it can be.

⁴⁹ *Gibbons v. Ogden*, 9 Wheat I. 190, 194.

⁵⁰ *Welton v. Mo.*, 91 U. S., 280.

⁵¹ *State v. Scott*, 98 Tenn., 254, 257; 7 Cyc., 416.

⁵² 21 Stat. Law, 502; Supp. Rev. Stat., 322.

522 This supersedes and abrogates all conflicting State statutes and general laws.

Railway Co. v. Hefley, 158 U. S., 99.

Railroad v. Hume, 106 Tenn., 76.

And where a contract to buy, sell, or exchange goods, to be transported among the several States, operates to restrain trade, it is a violation of the Federal law.⁵³

The latest treatise upon the police power is by Professor Freund. After discussing the Federal Anti-Trust Laws, he says that a State—"cannot prevent an industrial *trust* organized in another State from coming into its territory for the purpose of selling its products to be sent from the State where they are manufactured.

"Probably a State cannot even prevent its own citizens from combining in its own territory to restrain competition in the importation of goods from outside of the State, although prohibitions to that effect are found in the anti-trust laws of several States." Referring to Arkansas, Minnesota, Montana, Tennessee, and Utah. (Freund's Police Power, sec. 342.)

A. As to the transactions at Gallatin—If the orders had been taken or the sales made by a traveling salesman of some Memphis oil dealer, for the shipment of oil from Memphis to Gallatin,

523 the transaction would have been one of intrastate commerce.

Such, however, is not the case. The case is one in which an Indiana corporation doing business at Evansville, Indiana, through its traveling salesman, Mr. Rosemon, made sales at Gallatin, Tennessee, for oil to be shipped from Pennsylvania and delivered at Gallatin. The transaction was one purely of interstate commerce.

The thing done, the transaction complained of, was this: Holt gave to the Gallatin merchants (who had previously given orders to Rosemon) and they accepted, gifts of oil upon the agreement to countermand the orders which they had given. That is the crime which is now complained of. If it be criminal, it is a crime because it is an offense or conspiracy against trade. But against *what* trade? The reasoning by which this Court in Holt's case was led to conclude that the crime was an offense against intrastate trade, was, in substance, this:

"The countermand of the orders was not in itself criminal. The gift of oil was not in itself criminal; but the agreement to countermand, for the purpose of destroying competition in the sale of oil at Gallatin, was a violation of the statute and a crime.⁵⁴ The agreement was made to lessen competition in the sale of oil which the Standard Oil Company then had stored at Gallatin for sale.⁵⁵ The agreement was made to protect the oil the Company then had stored at Gallatin, from competition with other oil about to be im-

524 ported and offered for sale at Gallatin by a competitor.⁵⁶ The importation of oil which was to be made by the Evansville

⁵³ Prent. & Egan Com. Cl. Fed. Cons., 329; 38 Am. St. Rob., 223.

⁵⁴ 117 Tenn., 657, 658.

⁵⁵ 117 Tenn., 657, 646.

⁵⁶ 117 Tenn., 646, 647.

Oil Company was merely the 'occasion' or 'incentive' of the conspiracy.⁵⁷ A combination affecting interstate commerce, is none the less a violation of the Federal anti-trust statute, because the agreement *incidentally* affects intrastate commerce; and conversely, a combination which violates the State statute, is none the less a violation because interstate commerce is also incidentally affected.⁵⁸ *This conspiracy directly affects intrastate commerce and incidentally affects interstate commerce, and therefore is a violation of the State and Federal statute.*"

This view, we respectfully submit, is erroneous. The "occasion" or "incentive" which caused the parties to make the agreement, the purpose they had in mind when making it, may be circumstances which taint the agreement and make it a crime—make it an offense against commerce. But they are not elements which determine or designate the kind of commerce. Whether such agreement be an offense against interstate commerce or whether it be an offense against intrastate commerce, is to be determined alone by the nature and terms and effect of the agreement itself. Motive and purpose and incentive are of minor importance, indeed, of scarcely any importance at all in the determination of that question.

525 "Where the contract," says Mr. Justice Peckham, "affects commerce only incidentally and not directly, in fact, that it was not designed or intended to affect such commerce, is simply an additional reason for holding the contract valid and not touched by an act of Congress. Otherwise the *design* prompting the execution of a contract pertaining to and directly affecting, and more or less regulating interstate commerce *is of no importance.*"⁵⁹

If it be conceded that the purpose in entering into the agreement was a lessening of competition in the sale of oil which the Standard Oil Company then had stored at Gallatin; that the fact that oil was about to be imported by the Evansville Oil Company for sale there, was the occasion and incentive for the conspiracy; that the agreement was "conceived and effected" to protect oil then stored at Gallatin from the competition of oil about to be imported by the Evansville Oil Company, still no light has been shed upon the *nature* of the agreement. These facts may tend to show that the character of the agreement was bad—that it was a criminal offense; but they do not enable us to determine whether that offense was primarily against interstate commerce or intrastate commerce. That question can be determined alone by consideration of the nature and effect of the agreement itself.

Now, undeniably, the transactions between the Evansville Oil Company, through Rosemon, and the four Gallatin mer-
526 chants, were interstate commerce. Equally undeniable it is, that the transaction or agreement between Holt and these same merchants, in terms, related to the interstate commerce transactions with the Evansville Oil Company above mentioned, and to them alone, and primarily and directly affect them. The primary,

⁵⁷ 117 Tenn., 647.

⁵⁸ 117 Tenn., 647.

⁵⁹ Addystone P. & S. Co. v. U. S., 175 U. S., 234.

direct, effect, and we may add object and purpose, was to cancel and destroy the agreements of purchase and sale then existing between the Evansville Oil Company and the Gallatin merchants, which agreements were purely of an interstate commerce character as above stated.

Mr. Justice Shields stated in Holt's case that the agreement was "conceived and effected" to protect the oil which the Standard Oil Company then had stored at Gallatin, "from competition with that *about to be imported* and offered for sale by a competitor, and not to protect that of the Evansville Oil Company yet to be transported there."⁶⁰ If that be true, we have the following case now before the Court: An agreement between Holt, Love, Lane, and Cron which in terms relates to, affects, and destroys the interstate agreements then subsisting between the Evansville Oil Company and Love, Lane and Cron, and which unlawful agreement was conceived and effected to protect the Standard Oil Company's oil then at Gallatin, from competition with that about to be imported and offered for sale by a non-resident competitor.

527 As will be observed, the agreement sought to be destroyed and which was destroyed, was one of interstate commerce. The destroying agreement related to that first agreement alone. The destroying element was made by citizens of Kentucky and Tennessee. It was made to protect against the competition of Indiana oil, about to be imported by an Indiana corporation for sale in Tennessee. Every element to make an offense against interstate trade is present, and not one is wanting. The fact that the agreement was made in Tennessee is not of the slightest significance, because every interstate agreement must be made *somewhere*, in some State, and the fact that it is made in a State does not keep it from being of an interstate character. The fact that the motive and purpose in making such agreement was to protect oil which the Standard Oil Company then had located and stored in Tennessee, from the competition of the Indiana company, is unimportant, for the same reason. Every conspirator in the United States who enters into a conspiracy to protect merchandise which he *already has on hand*, even though that conspiracy be one which no one can deny is an offense purely against interstate commerce, must have the goods which he desires to protect, located *somewhere*. The error in the logic of Holt's case, we respectively submit, is this: It proceeds upon the assumption that if the merchandise which a conspirator seeks to protect from competition (by entering into a conspiracy against trade) is *already* in existence and located, or stored in a State, that fact makes the

528 agreement local—makes it an offense against State law, instead of an offense against Federal law, whatever may be the terms, nature, and effect of the agreement in fact. If that were true, it is obvious that there can be no such thing as a conspiracy, or combination against interstate trade, or a violation of Federal law, when the object and purpose of the agreement is to protect from competition merchandise already existing and stored in some State. As merchandise in *in esse* must be located *somewhere*, every agreement

⁶⁰ 117 Tenn., 646, 647.

lessening competition in the sale of that merchandise (according to Holt's case) is an offense against intrastate commerce, and cannot be an offense against interstate commerce, *because the merchandise is within the limits of some State.*

In *Hopkins v. U. S.*, 171 U. S., 603, it was insisted that the fact that the stock yards at Kansas City were in two States (Kansas and Missouri) was a material fact in determining the character of the business done: but the Court held that it was not of the "slightest materiality" and that the business done at these yards so situated was intrastate in character. The converse of the rule is of course true also. That the yards are in one State instead of two and already in use and located, would not keep it from being of an interstate character.

It is to be constantly borne in mind that the question is not whether this *statute* of Tennessee (ch. 140, Acts 1903) is invalid because it regulates interstate commerce, but it is this: Is the
529 conspiracy *agreement* a violation of the Federal statute, or of the State statute? There is a Federal statute which makes criminal all combinations in restraint of interstate trade, and there is a State statute which makes criminal all combinations against intrastate trade. It is not a question whether the State statute impinges on the Federal statute. The question is whether an agreement which this Court denounced in Holt's case as criminal, is an offense against the one statute or the other.

Undeniably this agreement in a general sense affects all commerce or trade, and therefore in a latitudinarian sense may be said to offend both the State and Federal statutes. This may be said of almost all agreements affecting the sale of merchandise. But while this is true, in a latitudinarian sense, it is not true in the legal sense. In law, in order to the administration of justice and to the delimitation, as far as possible, of the jurisdictional boundaries of the State and Federal government, commerce in all cases will be adjudged to be either intrastate or interstate commerce—one or the other, but not both. It was to prevent such things that the interstate commerce clause of the Constitution was adopted. And so it must be that every conspiracy against trade and commerce is to be adjudged an offense against either interstate or intrastate commerce, one or the other, but not both.

To do this, the Courts have distinguished between "direct"
530 or "indirect and remote" effects. An examination of the cases reveals that the Courts have adopted this nomenclature for lack of better terms. There is no distinct line of demarkation between interstate commerce and intrastate commerce. They run into each other. It is for that reason this Court has said that a combination which affects interstate commerce is *none the less* an offense against Federal law, "and punishable under it," because it also "incidentally" affects intrastate commerce.⁶¹

The contract condemned by the Federal statute is "one whose *direct and immediate effect* is a *restraint* upon that kind of trade or commerce which is interstate." * * * There must be some *direct*

⁶¹ 117 Tenn., 647.

and immediate effect upon interstate commerce to come within the act.⁶² "There must be, so to speak, a *privity* between the *manifestation* of the power and the *resulting* burden."⁶³

This last was said with reference to a State *statute*, but the principle is the same as to *agreements*.

In *Cincinnati Packet Co. v. Bay*, 200 U. S., 179, the question was whether a certain agreement violated the Federal law. The Court said that it did not; that "the chief and visible object of *its provisions* has nothing to do with interstate commerce."⁶⁴

531 Tried by this rule, the Holt-Love-Cron agreement (if criminal) is an offense against Federal law. The Rosemon-Love-Cron contracts which it was meant to destroy, and which it did destroy, undeniably, were of an interstate commerce character. The competition with oil *about to be imported*, and against which it sought to protect the Standard Oil Company's oil, was of an interstate character. As this Court admitted, an agreement which directly affects interstate commerce is none the less an offense against Federal law, and punishable thereunder, because it indirectly affects intrastate commerce also.⁶⁵

Suppose that the importation of oil by the Evansville Oil Company was "*the occasion, the incentive, of the conspiracy*,"⁶⁶ surely it is inexact to say that this fact must make the *agreement* one which directly affects intrastate commerce. It is erroneous because that may be the *incentive* to make the agreement, and still the *agreement* be one which directly affects interstate commerce. Presumably an agreement whose purpose was to prevent the importation of oil from another State (which is itself interstate commerce) would be levelled at and relate to interstate commerce instead of intrastate commerce. And, finally, it is to be said that the agreement itself related alone to interstate commerce. That was the "chief and visible object."

532 B. *As to the contract with the Cassety Oil Company—*

This contract was also one directly relating to, and directly affecting, interstate commerce. The principles which apply to the Gallatin conspiracy apply here also. The contract was made at Cincinnati, Ohio, between Kentucky and Tennessee corporations. It was a contract of agency whereby the Tennessee corporation agreed to sell the oil of the Kentucky corporation for it, at Nashville, Tennessee. The oil to be sold was to be brought in tank-cars from the Kentucky Company's refineries in other States than Tennessee. Conceding (for argument) that this agreement was a conspiracy against trade, it was one directly affecting and relating to interstate commerce. The fact that pursuant to this agreement oil might be stored and sold in Tennessee, cannot alter the terms and affect the agreement itself. It had to be stored *somewhere*, and it had to be sold somewhere. We are not dealing with warehouses, but with an *agreement*.

⁶² *Hopkins v. U. S.*, 171 U. S., 578, 592.

⁶³ *Northern Security Co. v. U. S.*, 193 U. S., 394. White, J., diss.

⁶⁴ *Ib.*, 184.

⁶⁵ 117 Tenn., 647.

⁶⁶ 117 Tenn., 647.

In *People v. Hawkins*, 157 N. Y.; 68 Am. St. Rep., 736, it appears that the Legislature of New York enacted a law requiring all prison-made goods to be labeled "convict-made," and making it a penal offense for any person to have prison-made goods for sale, not so marked.

Hawkins, a merchant doing business in New York, ordered, and after they came, exposed to sale, a lot of scrub-bushes made by convicts in the penitentiary of the State of Ohio. He was indicted under the act above referred to. The Court held that the act
533 was a regulation of interstate commerce, beyond the power of the State Legislature.

The fact that the brushes came to a rest in New York, were stored there, and were sold there, did not affect the question.

Finally it may be remarked that the decision of the State Court as to this question is not conclusive on the Supreme Court of the United States. The decision of the State Supreme Court as to the meaning of the statute, as to the true reading of chapter 140 of the Acts of 1903, is binding and conclusive, but as to whether the agreement alleged to be in violation of that act, and not in violation of the Federal statute, violates the one or the other, the decision of this Court will not be conclusive on the Supreme Court of the United States. It is a question for that Court alone.⁶⁷

X.

The Act upon which this bill is based is unconstitutional and void in that (1) it denies to the defendant the equal protection of the laws, and (2) deprives it of its property without due process of law.

"Property" includes the right to acquire, and to dispose of, property, and to make all proper contracts with respect thereto.

534 *In re Jacobs*, 98 N. Y., 98; S. C. Am. Rep., 640;
University v. Cheney, 116 Tenn., 259;
Harbison v. Knox Iron Co., 103 Tenn., 430;
Allgeyer v. Louisiana, 165 U. S., 589.

Corporations are "persons" within the meaning of the Fourteenth Amendment, as already shown.⁶⁸

Laws designed to check evils which are incident to persons as well as corporations, but which are applicable to corporations alone, are unconstitutional and void.⁶⁹

As already shown,⁷⁰ this act is a general criminal law applicable to persons and corporations alike.

The offense when committed, whether by a person or a corporation, is precisely the same and committed in the same way. In

⁶⁷ *Sullivan v. Texas*, 207 U. S., 416, 423; *Newport Light Co. v. Newport*, 151 U. S., 527, 536.

⁶⁸ Ante, p. 111; *Santa Clara Co. v. Railroad*, 118 U. S., 394; *Railroad v. Nebraska*, 164 U. S., 403.

⁶⁹ *Ballard v. Miss. Cotton Oil Co.*, 81 Miss. 507, 509; *Bedford Quarries Co. v. Bough*, 80 N. E. Rep., 529.

⁷⁰ Ante, p. 108.

that respect the act, as this Court has said, makes no distinction between persons and corporations.⁷¹ When a person is accused of violating its provisions, and is put to answer that criminal charge that course must be pursued which was pursued in Holt's case, 117 Tenn., 664. Mr. Holt was put to answer the charge by indictment as the Constitution requires. He was entitled to be tried and he was tried, by a jury of twelve men, and not by one Judge on the eve of an election. He was tried under laws which required that his guilt should be established by *evidence* 535 *beyond a reasonable doubt*. He was tried under laws which secured to him the defense of the statute of limitations, a defense that would have been complete if he had not been indicted until March 16, 1907, when the present bill was filed against the Standard Oil Company.

As has already been explained, the guilt of the defendant, if it be guilty, is imputed guilt. The Company cannot be imprisoned because it is a corporation, and not a natural person. For that same reason it cannot commit a crime. But upon grounds of public policy it is punished for the crime of its agents in some cases. In those cases the crimes of the agent are imputed to the Company. Although this is true, and although in the present case the Company sinned because its agent, Holt, sinned, and at the same time, and in the same place, and in the same act, or transaction, and although under this statute Holt could be tried and convicted only in the manner and in the form above stated, the Company is put to answer the same charge by a proceeding which places it in an altogether different plight. It is not put to answer by a bill of indictment, but by a bill in equity. It is denied the right of trial by jury, and put on trial before a single judge. The procedure is civil in form, so that instead of its guilt being required to be established beyond a reasonable doubt, a mere preponderance of evidence is sufficient.⁷²

536 The claim of the Attorney-General also is that as this is a bill in equity, the defendant cannot interpose the statute of limitations (which Holt could interpose if he were on trial) as a defense. For the purpose of the point now being considered, it must be taken that this contention of the Attorney-General is true.⁷³

Why should corporations be thus discriminated against? Why should a corporation be put to answer the charge of violating a general criminal statute by bill in equity when persons are charged by indictment? There may be reasons why, after a domestic corporation has been regularly tried and convicted, and a judgment of dissolution pronounced by the Criminal Court as the punishment prescribed by the statute, there ought to be some sort of procedure at law or in equity to wind up its affairs, but there is no reason for any such procedure or machinery in the case of a foreign corporation. The only judgment to be pronounced is that it shall cease to do business. Nothing is to be done, or can be done, with it or its prop-

⁷¹ *Standard Oil Co. v. State*, 117 Tenn., 664.

⁷² *Fleming v. Wallace*, 91 S. W. R., 47 Tenn., 1905; *McBee v. Bowman*, 89 Tenn., 140.

⁷³ If it is not, and if the statute can be interposed, that is an end of the case.

erty, or affairs. The simple command, "Cease to do business in Tennessee," is all there is of it. And there is no reason whatever why either a domestic or a foreign corporation should be put to answer the charge, and the question of guilt or innocence be tried, under a bill in equity, instead of a bill of indictment.

This is true also with respect to the tribunal. No reason
537 exists why the guilt of a corporation charged with violating a general criminal law should be tried by a single Judge, when in the same case a person is entitled to a trial by a jury.

And upon what principle is a statute to be maintained which for the same identical offense requires the guilt of *persons* to be established beyond a reasonable doubt, and the guilt of corporations by a preponderance of the evidence merely? For if this bill in equity is a civil proceeding making a civil case, that is all that is required; and if it is a criminal case, the Court is without jurisdiction.

And upon what principle of equality and justice, it may also be asked, shall corporations be proceeded against in such a way as to deprive them of the defense of the statute of limitations, when persons who commit the identical same offense are proceeded against in such a way as to secure to them the benefit of such defense?

It is too obvious to remain unacknowledged that these discriminations are arbitrary, capricious, unreasonable and oppressive. Neither can it be denied that these discriminations are made by the Anti-Trust Act of Tennessee.

It is no answer to say that it was held in Holt's case and upon this defendant's insistence that this act does not permit a corporation to be indicted for violating its provisions. This defendant, by its
538 counsel, did insist that corporations could not be indicted and fined under the act now being considered, and this Court so held.⁷⁴ But it was not argued, neither was it held, that an act which does provide for indictment and fair trial cannot be passed; neither was it argued nor held that this Act of 1903 *ought* not to have provided for a fair trial by indictment. What the Legislature *has* done in enacting a particular statute is one thing, and what it *can* do in a proper statute is another.

Neither is it true that this Court has already decided that the Act of 1903 is constitutional and valid. Whether it is invalid because it is in conflict with the Federal Constitution is of course a question for the Supreme Court of the United States to finally decide. Nevertheless, until such decision, this Court must also decide for itself, if the question be presented. The question whether this act violates the Fourteenth Amendment to the Constitution of the United States has not heretofore been decided by this Court, and is for the first time to be determined by it. The history of the Anti-Trust Act is this:

In the year 1889 the State of Texas enacted an anti-trust law, the thirteenth section of which was as follows: "*The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*" And, also, in the year 1893 the

⁷⁴ 117 Tenn., 654.

State of Illinois enacted an anti-trust law, the nineteenth section of which was identically the same as this thirteenth section of the Texas statute.

539 In 1897 the Legislature of Tennessee also enacted an anti-trust law, the fourth section of which was a *verbatim* copy of this nineteenth section of the law of Illinois.⁷⁵

In 1900 the Tennessee statute of 1897 came up before this Court for review, in the *State v. Schlitz Brewing Co.*⁷⁶ In the meantime the Illinois statute had been pronounced unconstitutional as a piece of arbitrary legislation, by the Federal Court sitting in that State, because of the provision excepting farmers and stock-raisers, hereinbefore set out.⁷⁷ This Connelly Case was presented as authority to this Court when the Schlitz Brewing Co. case was heard, but the Court refused to follow it. "We decline to follow that decision," said Judge Caldwell, "unsupported by discussion or the citation of authorities, as it is, over our own conviction, and in the face of the numerous cases mentioned in this opinion."⁷⁸

Accordingly, on the 8th day of June, 1900, this Court declared that the Tennessee statute of 1897 was valid, and that the classification recognized by its fourth section was not arbitrary, but just and reasonable.⁷⁹

But the Connelly case was taken to the Supreme Court of the United States, and on the 10th day of March, 1902, it was 540 affirmed. That Court held that the exception in favor of stock-raisers and farmers was capricious and arbitrary, and rendered the whole act unconstitutional and void.⁸⁰ This decision, of course, paralyzed the Tennessee act, forasmuch as it contained identically the same fatal provision. To meet that decision, the Legislature of Tennessee, on the 23d day of March, 1903, re-enacted the statute (which was chapter 94 of the Acts of 1897) with the exception that this vitiatory provision in favor of farmers and stock-raisers was omitted.

It was said below, and probably will be repeated here, that it was decided in *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn., 715, that a bill of ouster could be maintained under this statute, *without* previous indictment and conviction, and so it was. But when the reason for that holding is recalled, together with the fact that the case has since been overruled in no less than three of its most important points, it is obvious that now it can have no weight as authority with this Court.

It was decided in that case that the special exemption of agricultural products and live stock from the provisions of the act was not arbitrary, but valid, proper and reasonable. It was subsequently settled by the Supreme Court of the United States that this identical provision in the Illinois Anti-Trust Act was arbitrary and

⁷⁵ Acts 1897, ch. 94.

⁷⁶ 104 Tenn., 715.

⁷⁷ *Union Sewer Pipe Co. v. Connelly*, 99 Fed. Rep., 354.

⁷⁸ 104 Tenn., 737.

⁷⁹ *State v. Schlitz Brewing Co.*, 104 Tenn., 715.

⁸⁰ 184 U. S., 554.

unreasonable, and rendered the whole act void.⁸¹ As a result of that decision the Legislature of Tennessee assumed the Schlitz Brewing Co. case to be erroneous, and the Act of 1897 to be void, and re-enacted it in 1903, but with section 4, the agricultural product clause, omitted.

It was also held in *State ex rel. v. Schlitz Brewing Co.* that a bill to oust a foreign corporation could be brought on the relation of a private person. This Court has since held in *State v. Standard Oil Co.*, 117 Tenn., 153, that the bill must be brought by the Attorney-General of the State—and for the simple reason that the act in express terms says so. Yet in the Brewing Company case a bill upon the relation of W. B. Astor, a private person, was sustained.

In that case it was also held that section 1 of the act *condemns* these combinations, and sections 2, 3 and 5 *punishes* them;⁸² that three *distinct* punishments are inflicted on corporations and persons alike, namely: (1) Fine; (2) Suit for damages; (3) Bill in equity to oust foreign corporations.⁸³

The point was made for the Brewing Company that there should have been an antecedent criminal conviction as a basis for the ouster proceedings,⁸⁴ but it was overruled upon the express ground that the penalty of expulsion was

542 “apart from, and *independent* of a criminal conviction. It is prescribed in a different section of the act, is expressed in unconditional terms, and is entirely *without* dependent connection with either the *criminal responsibility*, or the *pecuniary liability*, prescribed *specially* in the other two sections respectively.” 104 Tenn., 751.

In Holt's case, 117 Tenn., 653, Your Honors wholly repudiated this interpretation. You held that corporations could not be indicted and fined under this act as framed, and that ouster was the punishment inflicted upon foreign corporations, and that it was *not* cumulative. The reason why it was said in that case that a bill in equity would lie as an independent cumulative proceeding,⁸⁵ is wholly rejected in Holt's case. The result is that nothing but fragments remain of the Schlitz Brewing Co. case.

The question whether the Act of 1903 is in violation of the Fourteenth Amendment has not been decided by this Court. And it is well settled that even though a statute may have been enforced by repeated decisions in which constitutional objections were *not* presented and considered, when they *are* presented, the previous decisions are regarded as being without force. It results that the Federal question now presented is *res integra*.

⁸¹ *Connelly v. Union Steam Pipe Co.*, 184 U. S., 554.

⁸² 104 Tenn., 733.

⁸³ 104 Tenn., 738, 742, 749.

⁸⁴ *Ib.*, 750.

⁸⁵ 104 Tenn., 751.

No decree can be rendered by this Court under the Act of 1903 which will affect the Company's interstate commerce trade. Even though the decree of the Chancellor should be affirmed, the Standard Oil Company can still sell through drummers, and ship in oil, as its competitors do now. The decree can go no further than to forbid the Company to "do business" in Tennessee—that is, compel it to close down its storage-tank stations, and to cease delivery by tank wagons. Undeniably, this will destroy the use of these valuable properties and cause no inconsiderable direct loss to the Company. It will suffer most from a decree of ouster in being deprived of the storage tank and tank-wagon *system* which it has built up and established. But, after all, the injury to the Company will not be greater than the damage done to the public. Oil can be gotten then only at great inconvenience and expense, when it is now supplied conveniently, promptly, without extra expense or delay. For this reason the evidence should clearly establish the defendant's guilt, before so hurtful a decree is pronounced. The record shows that this Company has been "doing business" in Tennessee for more than twenty years, and that the only acts of an alleged illegal character which it has committed are the two transactions set forth in the bill. The Company opened the door and invited investigation.

It asserted (and proved) that this was the only instance in
544 which oil had been given away to cancel the orders of competitors during its long and active business career in Tennessee. That was a challenge to the Attorney-General to ransack the State. No other instance has been shown.

When the circumstances under which oil was given away at Gallatin are considered, this proceeding might well be regarded as frivolous, were it not that it was instituted and is being prosecuted by the Attorney-General of the State. It certainly appears to be too small and accidental a transaction to merit the heavy punishment which is sought to be inflicted.

And, it may be added, the case now presented is quite different from the case which the opinion states in *Standard Oil Company v. State*, 117 Tennessee. It is there stated that the oil seems to have been shipped from Evansville *before* the orders were countermanded.⁸⁶ It now appears that it was not, and that when it arrived at Gallatin the ordering merchants were not even asked to take it.⁸⁷

It is there said that the agreement was made to protect oil which the Standard Oil Company *then* had stored at Gallatin from competition with oil of the Evansville Oil Company about to be imported.⁸⁸ It now appears that the agreement had no relation whatever to oil then at Gallatin.⁸⁹

545 It is there said that the Company's oil was inferior, and that it was selling it at 13½ cents, a price in *excess* of its market value at other places.⁹⁰ It now appears that such is not the

⁸⁶ 117 Tenn., 635.

⁸⁷ Ante, p. 14.

⁸⁸ 117 Tenn., 646, 647.

⁸⁹ Ante, p. 86.

⁹⁰ 117 Tenn., 655.

case. A schedule of prices at all points in Tennessee where the Company sold oil is in the record,⁹¹ and it shows that the price at Gallatin was less than at others as near to Nashville as Gallatin—notably Springfield and Murfreesboro. It was said in that case that merchant Love was a conspirator. This he and all the merchants deny, and no one says that they were.⁹² It was said there that it was “difficult to believe” the statements of Rutherford and Holt, that Holt intended to pay for the oil himself and that it was evidently discredited by the jury.⁹³ Here a number of circumstances show that statement to be true, and there is nothing which can justify a refusal to credit that statement.

Much was said in that case about the “inferior” oil of the Standard Oil Company. The oil of the Evansville Oil Company probably was superior to that sold generally in Tennessee. The Standard and Fire Proof Oil sold by the Standard Oil Company was being sold at Gallatin at 13½ cents per gallon. The Evansville Oil Company sold its oil at 14½ cents and \$1.00 for the barrel, and at this price

only when as much as a car load was taken.⁹⁴ It ought to
546 have been superior and doubtless was. The Standard Oil Company had a superior grade of oil which it sold, but at a higher price.⁹⁵ But not more than one-half of one per cent. of the oil sold by the Company in Tennessee was of this high-price, superior grade.⁹⁶ The “Fire Proof” was good enough, and cheaper.

So it appears that this case differed materially in its facts from the case stated in the opinion in *Standard Oil Co. v. State*, 117 Tennessee.

It was remarked by Judge Shields in the opinion in that case that the statute imposed a “severe punishment,” and one “doubtless which the principle fears greater, and which is far more reaching” than the \$5,000—fine erroneously inflicted by the trial court—ouster from the State.

This is not to be denied. A *severe* punishment is inflicted—a punishment severe alike in all cases, and the same, whether the offense be a single act of an employee, like Mr. Holt, or years of persistent and aggravated offending. The punishment is one which the Company does fear, and has feared, and for that reason, if none other, has all the time been careful to avoid. The record shows that it has done business in Tennessee for more than *twenty* years,
and has outstripped all competitors. If it had been in the
547 habit of countermanding the purchase orders of its competitors by gifts of oil, surely somebody would have known it, and in these times over-anxious to tell it on the defendant. But not a single case is shown, although the State has had since Oct. 12, 1903, to find them out.

Shall this severe and feared punishment be inflicted because of the isolated transaction of salesman Holt, detailed above?

⁹¹ Trans., 240-271.

⁹² Ante, p 17.

⁹³ 117 Tenn., 672.

⁹⁴ Trans., q. 8, p. 62.

⁹⁵ Trans., pp. 226, 72.

⁹⁶ Trans., p. 559, p. 226.

We submit that *on the facts* the defendant is guilty of no offense; and that if guilty *this* bill in equity cannot be maintained, and ought to be dismissed.

JOHN J. VERTREES,
WILLIAM O. VERTREES,
Counsel for Defendant.

February, 1908.

548 In the Supreme Court of Tennessee.

No. 5. Sumner Equity.

STATE OF TENNESSEE *ex Rel.* ATTORNEY GENERAL
vs.

STANDARD OIL COMPANY OF KENTUCKY.

Brief on Behalf of the State of Tennessee.

Charles T. Cates, Jr., Attorney General.
R. L. Peck, W. A. Guild, Of Counsel.

548½ In the Supreme Court of Tennessee.

No. 5. Sumner Equity.

STATE OF TENNESSEE *ex Rel.* ATTORNEY GENERAL
vs.

STANDARD OIL COMPANY OF KENTUCKY.

Assignment of Errors and Reply Brief on Behalf of the State of Tennessee.

Statement of Case.

May it Please Your Honors:

This cause was instituted in the Chancery Court of Sumner County by a bill in equity filed in the name of the State of Tennessee, by and upon the relation of the Attorney General, seeking to cancel the license of defendant, Standard Oil Company, a foreign corporation, and to oust and enjoin said defendant from doing business
549 within the State of Tennessee, on the ground that said defendant had violated the provisions of the

Tennessee Anti-Trust Act,

which (Acts of 1903, ch. 140) is as follows:

An act to declare unlawful and void all arrangements and contracts, agreements, trusts and combinations made with a view to lessen, or which tend to lessen, free competition in the importation or sale of articles imported into this State; or in the manufacture or sale of articles of domestic growth or of raw material; to declare unlawful and void all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price of such product or article to the producer or consumer of any such product or article; to provide for forfeiture of the charter and franchise of any corporation, organized under laws of this State, violating any of the provisions of this act; to prohibit every foreign corporation violating any of the provisions of this act from doing business in this State; to require the Attorney General of this State to institute legal proceedings against any such corporations violating the provisions of this act, and to enforce the penalties prescribed; to penalties for any violation of this act; to authorize any person or corporation damaged by any such trust, agreement or combination to sue for the recovery of such damages, and for other purposes.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same,*

That from and after the passage of this act all arrangements, contracts, agreements, trusts or combinations between persons
 550 or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend, to advance, reduce or control the price or the cost to the producer or the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void.

SEC. 2. *Be it further enacted,* That any corporation chartered under the laws of the State which shall violate any of the provisions of this act shall thereby forfeit its charter and its franchise, and its corporate existence shall thereupon cease and determine. Every foreign corporation which shall violate any of the provisions of this act is hereby denied the right to do, and is prohibited from doing, business in this State. It is hereby made the duty of the Attorney General of this State to enforce these provisions by due process of law.

SEC. 3. *Be it further enacted,* That any violation of the provisions of this act shall be deemed, and is hereby declared to be, destructive of full and free competition and a conspiracy against trade, and any person or persons who may engage in any such conspiracy or who shall, as principal manager, director or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders made in furtherance of such conspiracy, shall upon conviction be punished by a fine of not less than one hundred

dollars or more than five thousand dollars, and by imprisonment in the penitentiary not less than one year nor more than ten years; or in the judgment of the court, by either such fine or imprisonment.

551 SEC. 4. *Be it further enacted*, That any person or person or corporation that may be injured or damaged by any such arrangement, contract, agreement, trust or combination, described in section 1 of this act, may sue for and recover in any court of competent jurisdiction in this State of any person or persons or corporation operating such trust or combination, the full consideration or sum paid by him or them of any goods, wares, merchandise or articles, the sale of which is controlled by such combination or trust.

SEC. 5. *Be it further enacted*, That it shall be the duty of the judge of the Circuit and Criminal courts of this State specially to instruct grand juries as to the provisions of this act.

SEC. 6. *Be it further enacted*, That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed.

SEC. 7. *Be it further enacted*, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 16, 1903. Approved March 23, 1903.

There was an original and an amended bill, and upon the hearing the Chancellor sustained a demurrer to the amended bill and granted the relief sought by and under the original bill, enjoining defendant from doing an intrastate business in Tennessee; from which the defendant prayed and was granted an appeal to this court, and the State prayed and was granted an appeal from the action of the Chancellor in sustaining defendant's demurrer to the amended bill.

552

The Pleadings.

A history of the acts and doings of the defendant, Standard Oil Company, upon which the relief is sought, is contained in the original and amended bills, and inasmuch as the allegations of the original bill are set forth in the amended bill, as are the material averments of defendant's answer to the original bill, a consideration of the amended bill will bring before Your Honors the entire case upon which the decree of the Chancellor was based. It was averred in the amended bill:

Complainant, State of Tennessee, shows unto Your Honor:

I.

That on March 16, 1907, she filed her original bill in Your Honor's court at Gallatin against the defendant, Standard Oil Company (of Kentucky), showing and alleging, among other things, the following:

First. That the defendant, Standard Oil Company, is a corporation originally chartered and organized under the laws of the State

of Kentucky, and since 1893 has been claiming the right to do, and has been doing, business in the State of Tennessee, after having filed a copy of its charter in the office of the Secretary of State of complainant State of Tennessee, on September 21, 1903; a duly certified copy of which is herewith filed as Exhibit A to this bill, but need not be copied in issuing process. Said defendant was, at the time of the matters hereinafter shown, and still is, doing business in Sumner County, Tennessee, and has a local agent residing at, in or near the town of Gallatin, in said Sumner County.

553 Second. Complainant further shows and avers that in 1903, the defendant, Standard Oil Company (for convenience hereinafter referred to as defendant company), was engaged in and carrying on the business in Sumner County, and in Tennessee generally, of a dealer in coal oil and other products of petroleum, which were and are commonly used for illuminating and other purposes, which it sold both to retail dealers and the public generally. The business of defendant company in the greater part of Tennessee, including Sumner County, was under the management and control of one J. E. Comer, whose headquarters or offices were at Nashville, in Davidson County, Tennessee, and the local agent having in charge the business of said company at or near Gallatin, Tennessee, was one O'Donnell Rutherford, and there was also employed in and about the business of defendant company one C. E. Holt, who was styled a "salesman," but who had charge, under the general supervision of said Comer, of the local agents and agencies of said company, inspecting the same and giving directions and instructions thereto. The said Comer, as special or managing agent, and the said Holt acting under him, were authorized by defendant company to do, and in fact did, whatever in their judgment was necessary to advance the interests of their employer.

Complainant further shows that the oil for illuminating and other purposes handled, sold and dealt in within the State of Tennessee, was imported and brought into said State from other States, and then stored in large iron tanks located at places where defendant company established local agencies, and from said tanks, usually called storage tanks, said oils were offered for sale and sold to retail dealers and oftentimes to the public generally. Defendant company had one of its storage tanks located at Gallatin, and from this tank it supplied the demand for oil at Gallatin and at other places in Sumner County.

554 Third. Complainant further shows and avers that prior to October, 1903, defendant company had succeeded in preempting and securing for itself the oil business in Sumner County, and had succeeded in preventing other dealers from coming in competition with its said business in Sumner County, and at said time, to wit: in October, 1903, was engaged in selling in Sumner County an inferior grade of oil at the price of 13½ cents per gallon.

Complainant further shows that thus matters stood in relation to the oil business carried on by defendant company at Gallatin, when, on or about October 5, 1903, one Claude Roseman, an agent or traveling salesman of the Evansville Oil Company, whose chief office

was at Evansville, in the State of Indiana, and which was engaged in the business of selling, among other things, illuminating oils, went to Gallatin, in Sumner County, Tennessee, and *offered for sale to certain retail dealers at that place a superior grade of oil in competition *with the oil of defendant company*, then stored in its tanks at Gallatin, or which was being offered for sale at that place, and the said Roseman succeeded in securing from certain customers of defendant company orders for about sixty barrels of oil at the price of 14½ cents per gallon, to be shipped from Oil City, Pennsylvania, and delivered in original packages to said persons giving said orders about November 1, 1903. Among others, said Roseman secured an order from one S. W. Love for ten barrels of oil; from one W. H. Lane an order for five barrels of oil; from one J. E. Cron an order for ten barrels of oil, and from one L. C. Hunter an order for sixty barrels of oil.

555 "Thereupon, information having come to defendant company that said Evansville Oil Company had secured orders for oil from and sold oil to, its customers at Gallatin, as hereinbefore shown, and was thereby and in that manner competing with the oil business of defendant company at Gallatin, the said *defendant company*, and it said agents, J. E. Comer, C. E. Holt and O'Donnell Rutherford, and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, *unlawfully made and entered into an arrangement, agreement and combination, with a view to lessen, and which tended to lessen, full and free competition in the sale of defendant company's oil then being sold or offered for sale at Gallatin*, and the said defendant company and its said agents, Comer, Holt and Rutherford, and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, entered into and made certain *unlawful arrangements, agreements or combinations, which were designed to advance, and which tended to advance, the price or cost to the purchaser or consumer of defendant company's said oil then being sold or offered for sale at Gallatin, as aforesaid*.

556 "And complainant further shows unto Your Honor that, in order to carry said unlawful arrangements, agreements or combinations into effect, and as a part of such unlawful arrangements, agreements or combinations, the said defendant company and its said agent, C. E. Holt, induced the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, to rescind and cancel their several purchases of oil or orders for oil from said Evansville Oil Company, and as a consideration or inducement for said re-cissions or cancellations, and as a part of said unlawful arrangements, agreements or combinations, said defendant company gave without cost or charge to the said S. W. Love one hundred gallons of oil, and to the said W. H. Lane fifty gallons of oil, to the said J. E. Cron one hundred gallons of oil, and to the said L. C. Hunter fifty gallons of oil; and, at its own expense, sent telegrams, in the name of said Love, Lane, Cron and Hunter, to said Evansville Oil Company, cancelling the orders of said parties.

* Italics herein, unless otherwise shown, are ours.

"Complainant further shows unto your Honor that the said Love and others named above not only rescinded and cancelled, in the manner and as above shown, their several orders given to the Evansville Oil Company as aforesaid, but that they refused to accept or receive said oil when the same was shipped to Gallatin. So that the said Evansville Oil Company was driven from the field as a competitor with defendant company in the oil business at Gallatin, and thereupon defendant company, having succeeded, by means of and through the aforesaid unlawful agreements, arrangements or combinations, in not only lessening, but destroying, full and free competition in the sale of its oil then stored at Gallatin and being offered for sale, immediately advanced the price of its oil, which was of an inferior grade, as hereinbefore shown, from 13½ cents per gallon to 14½ cents per gallon, the price at which the said Evansville Oil Company had offered for sale and had sold a grade of oil far superior as complainant is informed and believes, to the oil sold by defendant company.

"So that complainant avers and charges that the unlawful arrangements, agreements or combinations, made and entered into between the defendant company and its said agents, Comer, Holt and Rutherford, and the said Love, Lane, Cron and Hunter, as hereinbefore shown, were not only made with a view of lessening full and free competition in the sale of defendant's oil at Gallatin, but that in fact said unlawful arrangements, agreements or combinations naturally tended to and did result in lessening and destroying full and free competition in defendant's said oil at Gallatin, and naturally tended to and did result in advancing the price or
557 cost of said oil to defendant's customers and the consumers of said oil in and about Gallatin, and in Sumner County, Tennessee.

"Therefore, complainant charges that defendant company, a foreign corporation as aforesaid, has, in the manner hereinbefore set out, violated the provisions of section 1 of chapter 140 of the Acts of the General Assembly of 1903, and this bill is brought by the complainant, through her Attorney General as aforesaid, in order that the punishment for such violations prescribed by section 2 of said act may be imposed upon said defendant company, to wit, that said defendant company be denied the right to do so, and be prohibited from doing, business in this State."

Fourth. And thereupon complainant prayed, in substance, that the said Standard Oil Company be made a party and required to answer, and for a decree enforcing the provisions of chapter 140 of the Acts of 1903, particularly the second section of said act, against said defendant, to the end that it be denied the right to do, and be ousted from doing, business within this State, and to the end that such decree be made effectual, that the license of said defendant to do business in this State be cancelled, and that its officers, agents, employes and all persons acting for it, be perpetually enjoined from doing or carrying on its business in this State; and for all such interlocutory orders and decrees as might become necessary during the progress of this cause, and for general relief.

II.

That process as prayed in said bill was duly served upon an agent of defendant, Standard Oil Company, and defendant entered its appearance and filed a demurrer challenging the legal sufficiency of the averments of said original bill, but said demurrer was overruled by your Honor at the May term, 1907, and the defendant allowed time within which to file an answer; whereupon, on the 6th day of June, 1907, the defendant filed its answer, admitting that it is a corporation chartered and organized under the laws of the State of Kentucky; that at the date of the transactions complained of in the bill it was and still is a dealer in oils and the products of petroleum, at Gallatin, in Sumner County, Tennessee, but denied that it had in any manner entered into any agreement of conspiracy in restraint of trade, or that it had violated the provisions of chapter 140 of the Acts of 1903, as charged in the bill, and set up, plead and relied upon, as averred in said answer, "the statute of limitations, particularly the said statute of one year, as a bar and defense against this present action and proceeding."

And in and by its said answer, defendant Standard Oil Company further showed and averred that at the May term, 1904, of the Circuit Court of Sumner County, it, along with two of its agents, C. E. Holt and O'Donnell Rutherford, was indicted upon a charge of having unlawfully conspired together and agreed with one S. W. Love to destroy full and free competition in the sale of oil in this State, and that, in furtherance of said conspiracy, they, the defendants in said indictment named, had then and there conspired with said Love to give him one hundred gallons of oil to countermand his order of purchase given to the agent of the Evansville Oil Company for ten barrels of oil, and that thereupon the said Love did agree to, and did countermand the said order, in consideration of said gift of oil; and also setting forth that at the same term of said Circuit Court, the defendant, Standard Oil Company, and said Holt and Rutherford, were also indicted for and on account of their transaction with J. E. Cron, W. H. Lane and L. C. Hunter; and that said defendant, Standard Oil Company, and said Holt and Rutherford, were tried upon the Love indictment at the September term, 1904, of said court, and while the said Rutherford was acquitted, the defendant, Standard Oil Company, and said Holt, were found guilty and a fine of \$5,000 assessed against defendant oil company and a fine of \$3,000 assessed against said Holt, and from the judgment entered thereon the said defendant oil company and Holt appealed to the Supreme Court of Tennessee, sitting at Nashville, where, in the due course, the case was heard, and on the 16th day of March, 1907, the judgment of the Circuit Court of Sumner County was, by the Supreme Court, affirmed as to said Holt, but reversed as to defendant, Standard Oil Company, because, as held by said Supreme Court of Tennessee, defendant oil company being a corporation, could not be indicted under section 3 of chapter 140 of the Acts of 1903, and for this reason the indictment as to said defendant oil company was quashed; that thereafter the other indictments which are still pending in the Circuit Court of Sumner

County against defendant Standard Oil Company were dismissed and a verdict of guilty rendered as against said Holt, and he was adjudged to pay a fine of \$100 and costs in each of said cases, and thereon defendant Standard Oil Company averred that the offense charged against it in the bill in this cause is a criminal charge, and that it cannot be put to answer or be proceeded against for such charge otherwise than by indictment or presentment, and a trial by a jury in a court of law, as in the case of other criminal charges, and that no verdict or judgment of conviction had ever been rendered against it on account of the offense charged against it in the bill in this cause, and that therefore this court has no jurisdiction or authority to render against it a decree of ouster, as prayed in the original bill.

560 And in and by said answer the defendant oil company reiterated its denial that it had violated the laws of the State of Tennessee, or that the acts set forth in the original bill and charged against it were unlawful, and set up and averred that "the acts alleged and the acts really done by it . . . are transactions affecting and relating to interstate commerce exclusively, and wholly beyond the power or authority of the State of Tennessee to regulate or punish or control; and that said act, chapter 140 of the Acts of 1903, in so far as it assumes to do so, is void, for that it is in violation of the Constitution of the United States."

III.

That upon the issue thus made, proof has been taken by both complainant and defendant, and in the taking said proof certain matters were developed until then unknown to your complainant, and which will be hereinafter more fully shown to your Honor. For a full account of said bill, answer and other proceedings in the cause, reference is hereby made to the original record.

IV.

And now, by leave of your Honor, complainant brings this, her amended and supplemental bill, into your Honor's said court at Gallatin, and further shows to your Honor:

(1) It is true that the defendant, Standard Oil Company, and C. E. Holt and O'Donnell Rutherford, were indicted by the grand jury of Sumner County at the May, 1904, term of the Circuit Court of said county, as set up in defendant's said answer hereinbefore referred to, and that said defendant, Standard Oil Company, and Holt and Rutherford, were duly tried at the September term, 1904, under the indictment charging a conspiracy with one S. W. Love, and that, by a verdict of a jury, the defendant, Standard Oil Company, and C. E. Holt, were found guilty and a fine of \$5,000 assessed against said Standard Oil Company, and a fine of \$3,000 assessed against said Holt, and judgment having been entered upon said verdict, an appeal therefrom was prayed by defendant oil company, and said Holt, to the Supreme Court of Tennessee, sitting at Nashville; and it is further true that said cause, having been heard by the Supreme Court of Tennessee, judgment

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of the Circuit Court of Sumner County was affirmed as to said Ho't, but reversed as to defendant oil company, for the reason set up and insisted upon by defendant oil company, as a complete defense in its behalf to said indictment, that it being a corporation, could not be indicted, as it had been indicted, under the third section of chapter 140 of the Acts of 1903, and therefore the indictment was quashed as to said defendant Standard Company and the case dismissed as shown by the judgment of said Supreme Court, and as a part of said judgment "without prejudice to such other proceedings as may be instituted against said Standard Oil Company to enforce the provisions of chapter 140 of the Acts of 1903, and particularly the provisions of section 2 of said act."

Said cause was, in fact, decided by the Supreme Court of Tennessee on or about the 23d day of February, 1907, but the judgment therein was not actually entered until the 16th day of March, 1907, as shown by a copy thereof filed as Exhibit No. 1 to a certain stipulation and agreement which has been filed and made a part of the original record in this cause.

Complainant further shows that in said criminal proceeding, tried as hereinbefore referred to, defendant Standard Oil Company 562 had insisted, and in a proper manner set up as a defense to the indictment preferred against it, that said Act of 1903 does not authorize an indictment against a corporation or permit a fine to be imposed upon a corporation, but that the penalty provided by said Act of 1903 against a foreign corporation for offending against the provisions of section 1 of said act, was to be found in section 2 thereof, and to be enforced by a bill in equity in the nature of a *quo warranto* proceeding, to oust the foreign corporation from doing business in this State. This contention was sustained by the Supreme Court of Tennessee, and said cause having been decided, as hereinbefore shown, on or about February 23, 1907, and final judgment entered upon the minutes of the court on March 16, 1907, your complainant, immediately thereafter, filed her original bill in this court, as hereinbefore shown, for the purpose of ousting defendant Standard Oil Company from doing business within this State.

(2) Complainant further shows unto your Honor that some years prior to October 30, 1899, the defendant, Standard Oil Company, had established a branch of its oil business at Nashville, in Davidson County, Tennessee, for the purpose, among other things, of selling therefrom refined oil (commonly known in the trade as coal oil or illuminating oil) and gasoline, and had placed agents in charge of its said business in Nashville, where it had established depots and storage tanks for the purpose of storing oil which it sold in Nashville, and the territory contiguous thereto; and the several years prior to October 30, 1899, the Cassetty Oil Company, a corporation chartered and organized under the laws of the State of Tennessee, with its prin-ipal office and place of business in Nashville, Tennessee, 563 had also been engaged in selling, among other things, refined oil and gasoline in competition with the oil sold and delivered in Nashville by defendant Standard Oil Company, from its oil depots or storage tanks at that place.

The said Cassetty Oil Company was, prior to October, 1899, known as, and in fact was, an independent dealer, in that it procured its supplies of oil sold by it from sources independent of the Standard Oil Company, and sold the same in competition with the oil sold in Nashville by defendant oil company.

Complainant further shows that for some time prior to October 30, 1899, competition in the sale of refined oil between defendant Standard Oil Company and said Cassetty Oil Company had resulted in greatly reducing the price of refined oil to the consumer in Nashville, and the business of the Cassetty Oil Company—which had no refinery of its own—in the sale of refined oil and gasoline was crippled and reduced to a considerable extent. Whereupon, on or about the 30th day of October, 1899, the defendant, Standard Oil Company, and the Cassetty Oil Company entered into an agreement or contract in writing as follows:

“Memorandum of agreement entered into this the 30th day of October, A. D. 1899, by and between the Standard Oil Company of Kentucky, incorporated, party of the first part, and the Cassetty Oil Company, incorporated, party of the second part—the said Cassetty Oil Company being located at Nashville, Tennessee.

“Witnesseth: That the above parties hereby entered into the following agreement, this agreement to continue for a period of (5) years from November 1, 1899, and to terminate October 31, 1904:

564 “For and in consideration of the conditions hereinafter named, the said party of the second part does hereby sell, convey and assign to the said party of the first part for the period covered by this agreement, all interest in the results or profits in the refined oil or gasoline business owned, controlled and operated by the said party of the second part.

“The party of the second part hereby agrees and binds itself to conduct the said refined oil and gasoline business in its own name as heretofore, giving the business such time and attention as required, utilizing all employes in the handling of the business as it has heretofore been handled, and in all particulars to give the business the same attention as if it were still being conducted in the interest of said second party; the party of the second part further agrees to be governed by and to follow in all particulars the direction of the party of the first part in the handling and mark-ing of said refined oil and gasoline during the existence of this contract;

“It is also agreed and understood that the party of the second part is to furnish the entire equipment requisite for handling the said refined oil and gasoline business, such as requisite storage tanks, warehouses and storage room, and all requisite facilities and appliances connected with the preparation and filling of barrels and other packages with said refined oil and gasoline; such storage tanks and warehouse buildings to be of good and sufficient character for the proper protection of the goods, wares and merchandise belonging to the party of the first part used in the handling of said refined oil and gasoline business; the party of the second part binds itself to in every way protect and care for the said stocks and merchandise, and to be

accountable for same, excepting in case of loss by fire or other causes or calamity against which reasonable precaution on their part could not have prevented.

565 "The party of the first part is to furnish the party of the second part all such stocks of refined oil and gasoline, empty barrels, glue, paint, bungs, etc., as may be required for the handling of said refined oil and gasoline business; all such oils are to be consigned to the party of the second part in tank cars, they to receive same and promptly unload all such tank cars on arrival. It is understood, however, a change in the method of supply of refined oils or gasoline may be made, by mutual agreement of the parties hereto, to meet any exigencies that may arise.

"The party of the second part agrees and binds itself to furnish all the requisite labor necessary in the handling of said refined oil and gasoline business, cooperage of barrels or packages, preparation and filling of same, draying and delivering, receiving and unloading, refined oils or gasoline, and to furnish all clerical help requisite for the keeping of accounts, necessary office room, account books, stationery, etc., used in the conduct of said refined oil and gasoline business; also to furnish the requisite salesmen for the selling and marketing of the said refined oils and gasoline, without expense or cost to the party of the first part, except as hereinafter named.

"The party of the second part further agrees and binds itself to furnish to the party of the first part monthly reports of sales of all refined oils and gasoline sold by said second party, and also stocks on hand, and other reports deemed necessary to intelligently follow the business; and the said party of the second part binds itself to pay in cash by the end of each month for all sales made during the previous month, it being understood and agreed that the said party of the second part guarantees all sales made by it.

566 "The party of the second part further agrees and binds itself to aid and assist in every way possible the development of the refined oil and gasoline business, and to give its support and co-operation towards furthering the general interest of the party of the first part.

"In consideration of the foregoing, the said party of the first part agrees and binds itself, during the existence of this contract, to pay to the party of the second part the sum of Three Hundred and Thirty-three (\$333.33) Dollars and Thirty-three Cents per month, or at the rate of Four Thousand (\$4,000) Dollars per annum; and in further consideration of the labor and expense connected with the handling of said refined oil and gasoline business, the party of the first part agrees to pay to the party of the second part, as compensation for such labor and expense, the additional sum of One Hundred and Sixty-six (\$166.66) Dollars and Sixty-six Cents per month, or at the rate of Two Thousand (\$2,000) Dollars per annum. Should the total number of gallons of refined oil and gasoline handled by the party of the second part exceed during any one year two hundred thousand (200,000) gallons, the party of the first part agrees to pay to the party of the second part one (1) cent per gallon on such excess. The aforesaid payments to be made monthly, at the end of each month.

"Witness the signatures of the parties hereto this the 30th day of October, A. D. 1899.

"STANDARD OIL COMPANY
(OF KENTUCKY),

"By ALEX. McDONALD, *Pt.*

"Witness:

"C. T. COLLINGS.

"CASSETTY OIL COMPANY,

"By JAMES R. McILWAINE, *V. P.*

"Witness:

"VENABLE PITTS."

567 Said contract or agreement was executed upon the part of defendant Standard Oil Company by its then president, Alexander McDonald, and upon the part of the Cassetty Oil Company by its then vice president, James R. McIlwaine.

Complainant further shows unto Your Honor and charges that while said contract and agreement was, in form and upon its face, a sale and conveyance by said Cassetty Oil Company of all its interest in the results or profits of its refined oil or gasoline business for a period of five years from November 1, 1899, nevertheless, the real purpose and intention of the defendant, Standard Oil Company, and said Cassetty Oil Company, in entering into said agreement, were that said Cassetty Oil Company should cease competing with the defendant, Standard Oil Company, in the sale of refined oil and gasoline—that is, cease to be a competitor with the Standard Oil Company in its business of selling refined oil and gasoline in Nashville, Tennessee, thereby giving and yielding to said defendant company full control of the Nashville market in respect of the price of refined oil and gasoline to the consumer in that territory, and it was upon this consideration and for this purpose that the defendant, Standard Oil Company, agreed to pay, and did pay, to said Cassetty Oil Company the sum of \$500 per month from the first of November, 1899, to October 31, 1904.

Complainant further shows and charges that said agreement heretofore set out was entered into with a view to lessen, and that it did tend to lessen, full and free competition in the sale of defendant Standard Oil Company's oil at Nashville, and that it was designed to give to the defendant, Standard Oil Company, control, and that it

568 did give to said defendant control, of the price or cost to the consumer of oil sold by it in the city of Nashville and the territory served therefrom; and after the execution of said contract defendant raised the price of oil several cents per gallon above the price to which it had been reduced by the competition aforesaid between it and the Cassetty Oil Company before said contract was entered into, and said Standard Oil Company has been ever since in full control of the price or cost of oil to the consumer in Nashville and the territory served therefrom.

Complainant further shows and charges that prior to the execution of said contract the said Cassetty Oil Company held itself out, and was in fact an independent dealer in oil, and a part of said agreement was that it should continue to hold itself out as an inde-

pendent dealer in refined oil and gasoline, and thereby deceive and mislead the public in regard to said agreement, so entered into for the purpose of eliminating and destroying competition between it and defendant company, and during the full period of five years from November 1, 1899, to October 31, 1904, the *the* said Cassetty Oil Company, under the control and management of defendant Standard Oil Company, held itself out as an independent dealer in refined oil and gasoline, but pursuant to the purpose and intention of said agreement, did not enter into competition with defendant Standard Oil Company in the sale of refined oil and gasoline, thereby enabling defendant Standard Oil Company to fully control the price and cost of refined oil and gasoline to the consumer in the city of Nashville.

Complainant further shows and charges that during the full period of said contract—that is, up to and until October 31, 1904—the purpose and intention of the said parties to said contract was carried out and observed, and said Cassetty Oil Company did not compete
569 with defendant Standard Oil Company in the sale of refined oil and gasoline, although, as provided in said contract, it held itself out to be an independent dealer in those products, and in consideration thereof continued to receive, down to October 31, 1904, the sum of \$500 per month from defendant Standard Oil Company; so that defendant Standard Oil Company, in the manner and by the means aforesaid, secured full control of the market and price of oil at Nashville, and having eliminated the Cassetty Oil Company as a competitor in the sale of refined oil and gasoline, the said defendant company, at the expiration of said contract, having no further use for the Cassetty Oil Company, declined to renew said contract, but has remained in practical control of the business of selling refined oil and gasoline in Nashville to this date.

Complainant further shows unto your Honor, that when she filed her original bill in this cause she had no information in relation to the contract hereinbefore set out between defendant Standard Oil Company and the Cassetty Oil Company, and that her first information in regard thereto came to the Attorney General during the taking of proof under the issues raised by the original bill and the answer thereto; and that the precise terms of said contract were not known to complainant or her Attorney General until said contract or agreement was produced on November 2, 1907, by James R. McIlwaine, now the president, and William M. Cassetty, one of the directors of said Cassetty Oil Company, whose depositions were taken on behalf of complainant in this cause, and said agreement filed as Exhibit A in the deposition of said William M. Cassetty.

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V.

To the end, therefore, that the defendant, Standard Oil Company, may show cause, if any it can, why complainant should not have the relief prayed in her original bill, and in this amended and supplemental bill, complainant prays:

(1) That the defendant, Standard Oil Company, be duly served with a subpoena and a copy of this amended and supplemental bill,

and that it be required to answer the allegations thereof fully and properly, but its answer under oath, or the equivalent of an oath, is hereby expressly waived.

(2) For a decree enforcing the provisions of chapter 140 of the Acts of the General Assembly of Tennessee for the year 1903, and particularly section 2 of said act, against defendant Standard Oil Company for and on account of its offenses against and violations of said act in said original and in this amended and supplemental bill set out; and to that end that said Standard Oil Company be denied the right to do, and be ousted from doing, business within this State; and in order that such decree may be made effectual, that the permission or license of the defendant, Standard Oil Company, to do business in this State be cancelled; that said defendant company, its officers, agents and employes, and all persons acting for it, may be perpetually enjoined from doing or carrying on its business in this State.

* Rec., pp. 26-38.

571 Defendant interposed a demurrer to the original bill, challenging its sufficiency upon the ground that the terms or provisions of the illegal agreements, arrangements or combinations alleged to have been entered into were not set out with sufficient particularity in the bill, but this demurrer was overruled.

Rec., 11, 400.

To the amended and supplemental bill defendant interposed a demurrer (Rec., 39), incorporated in its answer, and the second ground of said demurrer specially challenged said amended and supplemental bill upon the ground, as claimed, that when the contract between defendant, Standard Oil Company, and the Cassetty Oil Company, set out in said amended and supplemental bill, was made and entered into, to wit, on October 30, 1899, there was no law in Tennessee which prohibited a foreign corporation from entering into such a contract or imposed the penalty of expulsion for entering into such a contract or doing business thereunder in Tennessee.

Upon the hearing, the second ground of demurrer was sustained and the amended and supplemental bill dismissed, and thereupon the State excepted to this action of the Chancellor and prayed and was granted an appeal to this court.

Rec., 402-403.

To the action of the court in sustaining said demurrer and dismissing her bill, the State now comes and submits the following

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Assignment of Errors.

(1) The Chancellor erred in holding that because the contract between the defendant and the Cassetty Oil Company, as set out in the amended and supplemental bill, was entered into prior to the passage of the anti-trust act of 1903, the acts and doings thereunder

*All references in this brief are to the printed record.

by said defendant subsequent to the passage of said act, were not illegal.

(2) The Chancellor erred in sustaining the second ground of demurrer to the amended and supplemental bill for the reasons stated therein, or for any other reason, and should have overruled the same, because the contract between the defendant, Standard Oil Company, and the Cassetty Oil Company, entered into on the 30th day of October, 1899, was a continuing contract, and, as averred in said amended and supplemental bill (Rec. 36, 37), was carried out and observed and acted on by defendant down to October 31, 1904. So that the acts and doings of the defendant thereunder, after the enactment of said anti-trust statute, were prohibited and were illegal just as if said contract had been entered into after the passage of said act.

Brief in Support of said Assignments of Error.

It will hardly be denied that the contract between the defendant and the Cassetty Oil Company comes within the inhibition of
 573 the anti-trust act of 1903, which was intended to make unlawful just such agreements as the one entered into between these corporations. It is to be noted that it is charged in the amended and supplemental bill that prior to the execution of said contract, the Cassetty Oil Company was in fact an independent dealer in oils, and had secured its oils from sources independent of the Standard Oil Company, and that after a season of competition, ruinous to the Cassetty Company, this contract (Rec., 33-35) was entered into, whereby the Cassetty Oil Company, while continuing to hold itself out as an independent dealer, virtually gave the control of its business to the defendant company, agreed to purchase all of its supplies of refined oil from defendant company, and to sell at prices fixed by the defendant; and that the purpose and effect of said contract was to not only lessen, but remove, competition upon the part of the Cassetty Company and enable the defendant company to monopolize and control the marketing and selling of oil in the Nashville territory.

This relation between the parties, it is true, began in October, 1899, but it continued in force and the parties acted thereunder up to October 31, 1904, so that, after the passage of the anti-trust act of 1903, to wit, on March 16, 1903, the defendant company from
 574 that date to October 31, 1904, was engaged in carrying into effect an agreement, and doing things thereunder, expressly prohibited and made unlawful by said act.

Rec., 33-37.

We submit that it was competent for the Legislature, under the police power, to provide and cause said act to operate not only upon agreements in the future, but upon such agreements as were in existence at the time of the passage of said act. Even if it be conceded that at the time of the passage of said act the agreement in question was not prohibited by any statute of Tennessee, nevertheless, immediately upon the enactment of the statute of 1903, such agreements

became illegal and the parties thereto were prohibited from further carrying them into effect, and if they did so, or attempted to do so, the parties so offending became subject to the penalties prescribed by said act.

In the case of the *United States v. Freight Association*, 166 U. S., 290, 342, the Supreme Court of the United States, in construing the Sherman Anti-Trust Act and applying it to a contract entered into prior to the passage of said act, held that an agreement prohibited by the terms of said act, though legal when made, became illegal upon the passage of said Sherman Anti-Trust Act, and the acts done under said act after its passage were in violation of it. In responding to the contention that to give such effect to the Sherman Anti-Trust Act made that act retroactive, the Supreme Court of the United States, among other things, said:

It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doings of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act.

The holding of the Supreme Court in this case (*United States v. Freight Association*) was reviewed and affirmed in the case of *United States v. Traffic Assn.*, 171 U. S., 558.

It seems to be well settled that where the doing of a thing contracted for becomes unlawful, further performance and further acts and deeds under such contract become illegal, so that the parties to such an agreement are excused from performance.

Pollock on Contracts (Addison's Notes), 352.

These principles were recognized and applied by the Supreme Court of Missouri in the case of *Fink et al., Trustees, v. Granite Co.*, 187 Mo., 244, 272-274, wherein the court had under consideration the effect of the Missouri anti-trust act upon contracts in existence at the time of the passage of said act; and in holding that the contract under consideration was a continuing one, and even though legal when made it became illegal after the passage of said act, the court, among other things, said:

Assuming that the contract in suit did not conflict with the principles of the common law, or with the provisions of the law of 1889 (if such an assumption can possibly be made), yet can the plaintiff successfully contend that the contract is not illegal under the law of 1891, on the ground that so to declare it would be to give the latter law a retroactive effect? To support such a contention it is necessary to assume that the law of 1891 would be given a retroactive effect. But is this true?

The contract is a continuous one. The law of 1891 is based on the valid exercise of the police power of the State. No one can have any vested right which he can claim to be exempt from the lawful exercise by the State of its police powers. Everyone holds his property rights subject to such lawful exercise. This proposition is established by an overwhelming array of authorities.

In the case of *Mugler v. Kansas*, 123 U. S., 623, the record showed that the people of Kansas had adopted a constitution prohibiting the manufacture and sale of beer and spirituous liquors in Kansas. The

Legislature passed an act enforcing this prohibition, in which
577 it declared that breweries where beer and spirituous liquors were manufactured are public nuisances subject to condemnation in judicial proceedings. The defendants were indicted under this law. The defense contended that they had long prior to the constitution and the law been in the business of manufacturing beer; that they had large sums invested in their manufacturing plant and business, which had been invested in good faith under the guarantees of the laws then existing; that the enforcement of this law against them amounted not only to a partial but a total confiscation of their property and property rights. This view was urged in the Supreme Court of the United States with an earnestness and ability hardly ever surpassed. The court in a learned and exhaustive opinion reached the conclusion that the law had been passed in the valid exercise of the police powers of the State and "that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and "if the public safety and morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be restrained in providing for its discontinuance by any incidental inconvenience which individuals or corporations shall suffer."

The identical question which is involved in the suit at bar was passed upon in the case of the *United States v. Freight Association*, 166 U. S., 290, in which it was held that an agreement entirely similar to the one at bar was a continuing one, and though legal when made, "the continuation of the agreement after it had been declared illegal becomes a violation of the act." The case arose under the act of the United States relating to pools, trusts, conspiracies, etc., in restraint of trade. See, also, *Ford v. Chicago Milk Shippers' Assn.*, 115, Ill., 166.

578 But it is to be borne in mind that such contracts as the defendant entered into with the Cassetty Oil Company, being in restraint of trade and for the purpose of stifling competition, are illegal and prohibited by the common law (*Standard Oil Co. v. State*, 117 Tenn., 660; *Bailey v. Master Plumbers*, 103 Tenn., 99), so that the effect of the act of 1903 was to deny to and withdraw from a foreign corporation the permission of the State to do business within her borders, if such corporation persisted in doing such illegal acts after the enactment of said statute.

For these reasons we respectfully insist that the learned Chancellor was in error in dismissing complainant's amended and supplemental bill.

579 *Reply to Assignment of Errors on Behalf of Defendant,
Standard Oil Company, as Appellant.*

Brief and Argument.

I.

We submit:

The original bill stated a good cause of action, pleaded with all of the certainty required by law, and gave the defendant ample and definite notice of the grounds or charges upon which the relief sought was predicated, so as to enable it to properly and intelligently prepare its defense thereto.

This proposition meets the third error assigned, to the effect that "the demurrer to the original bill should have been sustained because it does not set forth the nature and terms of the agreement alleged to be illegal" (Defendant's Brief, p. 64).

In response to this we have only to call the attention of Your Honors to the averments of the bill to demonstrate that the "nature"—that is, the *object* and *purpose*—of the agreement alleged to be unlawful, is set forth with certainty and precision.

580 The object and purpose of the arrangements, agreements and combinations averred to be unlawful are:

First. That they were made with a view to lessen, and that they in fact tended to lessen, full and free competition in the sale of defendant company's oil, then being sold or offered for sale at Gallatin.

Second. That such agreements were designed to advance, and in fact tended to advance, the price or cost to the purchaser or consumer of defendant's said oil, then being sold or offered for sale at Gallatin, as in said bill set out.

Rec., 3.

Further, while it was wholly unnecessary to set out and aver the "terms" of the agreement—that is, the means or methods in detail by which the alleged illegal agreements were to be accomplished—we respectfully insist that if the rules of pleading require the terms of the agreements alleged to be illegal, or the means by which they were to be accomplished, to be set out, the bill in this respect would fully meet the rules of good pleading.

Learned counsel for the defendant, we submit, take a too restricted view of the averments of the bill, and wholly fail to accord to such averments their just and proper effect.

581 However, before proceeding to analyze the averments of the bill, it will be helpful to examine some of the authorities relied upon by defendant, and then ascertain the rules of pleading by which the bill in this case must be judged.

The principal case relied upon by defendant to sustain its contention is that of the State *v.* Witherspoon, 115 Tenn., 138. In this case it appears that one Witherspoon had been indicted under

the anti-trust act of 1903 for that (115 Tenn., 141) he, "as president, director and agent of the Southern Seating & Cabinet Co., a corporation chartered under the laws of the State of Tennessee, with its situs and principal place of business in Jackson, Tenn., did carry out the stipulations, purposes, prices, rates and orders made by said Southern Seating & Cabinet Co. with the American School Furniture Co., a foreign corporation, in furtherance of a conspiracy against trade, to wit: the said Southern Seating & Cabinet Co. and the said American School Furniture Co. having theretofore entered into and being then and there parties to an agreement, contract, arrangement, trust and combination, with a view to lessen, and which tended to and did lessen, full and free competition in the importation and sale of articles imported into the State of Tennessee, and in the manufacture and sale of articles of domestic growth and of domestic raw material, and which tended to
582 and did advance and control the price of such product and article to the consumer and buyer thereof, against the peace and dignity of the State."

In sustaining the judgment of the lower court quashing said indictment, this court, among other things, said:

It is also correctly said that in a prosecution for a conspiracy, which a violation of this statute is by it declared to be, the means by which the unlawful agreement and conspiracy was intended to be effectuated, or the evidence tending to prove the unlawful agreement, need not be set out, and that it is sufficient to charge in the indictment the existence and object of the conspiracy, without any statement of the means intended to be used in its accomplishment; the means being only matters of evidence to prove the fact of conspiracy. 3 Wharton Crim. Law, Sec. 350; *Rex v. Eccles*, 1 Leach, 274; *Rex v. Gill & Henry*, 2 B. & Ald., 204; *People v. Richards*, 1 Mich., 216, 51 Am. Dec., 75; *State v. Crowley*, 41 Wis., 271, 22 Am. Rep., 719.

But this does not meet the objection to this indictment. It is not that the indictment fails to set out the means by which the conspiracy charged was intended to be carried into effect, but that the conspiracy and the object to be effected are not sufficiently stated and charged so as to give the defendant notice of the particular crime and its nature with which he is charged, and to so describe and identify the offense that the judgment in this case could be relied upon in another for the same thing, as a former acquittal or conviction.

115 Tenn., 143, 144.

583 Further, after quoting the precise terms of the indictment, this court, among other things, said:

But it utterly fails to state the terms of the agreement, or arrangement entered into by the parties, and the particular articles imported or of domestic manufacture or growth, the price of which such arrangement, agreement and conspiracy tended to control and lessen or advance. The indictment would apply to imported articles as well as domestic articles, and to domestic manufactured articles equally with articles of raw material. It would apply equally to any one of the hundreds of articles of commerce which are imported

into the State or which are here manufactured or otherwise produced. It clearly, for these reasons, fails to give the defendant any notice of the nature of the charge brought against him, or of the particular crime with which he is accused and is held to answer, so that he could with intelligence prepare his defense. Nor is the crime charged so identified that the record in this case could be relied upon in another for the same offense upon the plea of former conviction or acquittal. The indictment should charge the particular article, whether imported or of domestic growth and manufacture in relation to which the contract, arrangement and agreement between the parties is made, and the effect of such arrangement upon the prices of such articles. Without a statement of these facts the defendant will be put to trial without presentment or indictment, and will be denied his constitutional right to know the nature and cause of the accusation against him.

115 Tenn., 147, 148.

We recognize that the holding of the court in Witherspoon's case is sound, but no argument is needed to distinguish between
584 that case and the one at bar, or, rather, between the insufficiency of the indictment in Witherspoon's case and the full certainty of the averments of the original bill in this case.

Let us analyze the bill, and particularly with a view to reply to the strictures thereon contained in defendant's brief at pages 65 and 66. The bill, in substance, avers:

First. That in October, 1903, the defendant, Standard Oil Company, was a dealer in oil at Gallatin in Sumner County, Tennessee, and had secured a monopoly of the oil business in that territory, preventing other dealers from coming in competition with its business at that place, and was selling an inferior grade of oil at 13½ cents per gallon; *that it had imported and stored in tanks at Gallatin large quantities of oil which was being sold and offered for sale throughout that territory.*

Second. That about October 5, 1903, the Evansville Oil Company, a competitor of defendant, sent its agent to Gallatin and there sold to certain retail dealers, customers of defendant, a considerable quantity of oil in competition with the oil of defendant then stored in its tanks and being offered for sale at that place; and that, among such customers, said agent of the Evansville Oil Company secured an
585 order from one S. W. Love for ten barrels of oil; from W. H. Lane an order for five barrels of oil; from J. E. Cron an order for ten barrels of oil, and from L. C. Hunter an order for six barrels of oil.

Third. That when defendant ascertained that said Evansville Oil Company had secured orders from and sold oil to its customers at Gallatin, and was actively competing with its oil business at that place, it, defendant, and certain of its agents, together with said Love, Lane, Cron and Hunter, unlawfully made and entered into certain arrangements, agreements and combinations, the object and purpose of which were: (1) to lessen, and which in fact tended to lessen, full and free competition in the sale of defendant company's oil then being sold or offered for sale at Gallatin; (2) to advance,

and which in fact tended to advance, the price or cost to the purchaser or consumer of defendant company's said oil then being sold or offered for sale at Gallatin.

Fourth. The object and purpose of the agreements alleged to be unlawful having been thus definitely set out, the means by which such object or purpose was sought to be accomplished, and was in fact accomplished, were then clearly and definitely stated; that is, the said Love and others, the customers of defendant who had
586 agreed to purchase oil from the Evansville Oil Company, were, by means of giving to such customers a certain quantity of oil, induced to cancel and countermand said orders, so that they refused to accept the oil which they had purchased from the Evansville company, and by such means said Evansville Oil Company was driven from the Gallatin territory as a competitor of defendant, and thereupon the defendant, having so removed all competition with its oil business at Gallatin, advanced the selling price of its inferior grade of oil then being sold at that place from 13½ to 14½ cents per gallon.

Rec., 2, 3, 4.

We respectfully submit to Your Honors that the averments of the bill as to precision and definiteness fully meet the rigid rules of pleading applicable to indictments in criminal cases.

Learned counsel for the defendant (Brief, 68, 69) ask "how is it possible for the act of Holt in inducing" Love and others "to cancel orders to be a *part of an illegal agreement*?"

We confess that we are unable to follow the refinement of learned counsel, but we do submit to the court that no sound reason is advanced why this act of Holt may not properly be considered a part
587 of an *arrangement* or combination or agreement made with a view to lessen competition or which tends to lessen competition—even if it is a means used to effect the object and purpose of such an arrangement or combination, it is an integral part thereof.

We submit that the great weight of authority is to the effect that where there is a charge of a combination or arrangement or conspiracy to do an unlawful act or for an unlawful purpose, it is only necessary to charge the existence of such combination, arrangement or conspiracy, and set out the object and purpose thereof.

In *4 Encyc. Pl. & Pr.*, p. 714, the rule is stated as follows:

If the act which the conspirators combine to perform is unlawful, it is unnecessary to set out in the indictment the means to be employed in accomplishing it. But if the end in view is lawful or indifferent, and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out such unlawful means.

See also *Pettibone v. United States*, 148 U. S., 197.

And where the combination or arrangement or agreement is for a purpose prohibited by statute, the *purpose* of the combination need

be set out only in such manner as to show that it is within the terms of the statute.

Commonwealth v. Eastman, 1 Cush., 190.

State v. Parker, 43 N. H., 84.

Hazen v. Commonwealth, 23 Penn. St., 364.

588 In the case of *Rex v. Eccles*, 3 Douglas, 337 (1 Leach, 274), there came before the court for consideration the sufficiency of an indictment for conspiracy to deprive and hinder one H. Booth from following his business as a tailor. It was moved in arrest of judgment that the charge was general. Lord Mansfield said:

"The conspiracy is to prevent Booth from working. The consequence is poverty. Both the conspiracy and the consequence are stated, but it is objected that there is no allegation of the means. Such an allegation is unnecessary."

In *Rex v. Parnell*, 14 Cox's Criminal Cases, 508, Willis, J., said:

The conspiracy consists of an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.

In *Rex v. Gill & Henry*, 2 B. & A., 204, the objection was made that the charge of a combination and conspiracy was too general, in that the means by which it was to be accomplished were not set out. The indictment charged that the defendants conspired by divers false pretenses and subtle means and devices to obtain from A. divers large sums of money and to cheat and defraud him thereof. It was held (1) that the gist of the offense being the conspiracy, it was quite sufficient only to state that fact, and its object, and not necessary to set out the specific means by which it was to be accomplished; (2) the offense of a conspiracy may be complete
589 although the particular means are not settled and resolved upon at the time of the conspiracy.

In *State v. Crowley*, 41 Wis., 271, it is said:

When the confederation consists in an agreement to accomplish a criminal purpose, while the purpose must be clearly expressed in the indictment, the specific means by which it is proposed to accomplish it need not be averred.

In *State v. Brady*, 107 N. C., 822, the court said:

As the conspiracy or illegal combination is the indictable offense, though no act may be done in pursuance thereof, and indeed without agreeing upon the means to be used, it is difficult to discover any reason why the means should be charged.

In *Hazen v. Commonwealth*, 23 Pa. St., 355, the court said:

Where the object itself is unlawful, the means by which it is to be accomplished are not material ingredients in the offense. The offense is complete the moment the conspiracy is made. It is not necessary that the object to be accomplished should be *malum in se*. It is sufficient that it be made criminal or even prohibited under penalties by statute.

In *Commonwealth v. Shedd*, 7 Cush., 514, it is said:

It is well settled that the general allegation that two or more

persons conspire to effect an object criminal in itself, as to
590 commit a misdemeanor or a felony, is quite sufficient, although the indictment omits all charges of the particular means to be used.

The same doctrine is recognized and enforced in: *State v. Kreach*, 40 Vt., 113; *State v. Ripley*, 31 Maine, 386; *Aldermen v. People*, 4 Mich., 414; *Lambert v. People*, 9 Cowan, 578; *State v. Loser*, 104 N. W. (Iowa), 337.

In the recent case of *C. W. & V. C. Co. v. People*, 214 Ill., 421, the sufficiency of an indictment for a combination in restraint of trade came before the court for consideration. The language of the indictment was as follows:

Being then and there engaged in or interested in the business of selling coal to the general public and to the consumers of said coal, did then and there wickedly and unlawfully create, enter into and become members of and parties to a trust, pool, combination, confederation and understanding with each other then and there to unlawfully regulate and fix the price at which coal should be sold in the State of Illinois.

This indictment was sustained.

In *2 Spelling on Extraordinary Legal Remedies*, Sec. 1251, it is said, in substance, that it is only necessary in a proceeding to forfeit the charter of a corporation by reason of a misuse or abuse of
591 a franchise, that the information should "set forth with reasonable certainty" the charge upon which the forfeiture is asked.

Therefore, we submit that the arrangement, combination or agreement averred in the bill to have been made with a view to lessen competition, and that such arrangement, agreement and combination did in fact tend to lessen full and free competition in the sale of defendant company's oil then stored and being offered for sale at Gallatin, and which arrangements, combinations or agreements were designed to advance, and did in fact tend to advance, the price or cost to the purchaser or consumer of defendant's said oil, were unlawful because so declared by the statute, and the object and purpose of such arrangement or agreements being stated, the defendant had ample notice of the definite charge it must meet, and to more than such notice it was not entitled.

It is scarcely necessary to reply to the statements found on page 70 of defendant's brief that "an agreement is not criminal because the Attorney General sees proper to apply the terms 'illegal' and 'criminal' to it."

What definition the law officer of the State may apply to such an arrangement or agreement may be and doubtless is quite unimportant. The question, however, which must be answered is:

592 Has the making and entering into of an arrangement or agreement of the character set forth in the bill, and for the purpose and effect therein set forth, been declared unlawful and prohibited by the Legislature?

This question is answered in Holt's case, where Your Honors branded the same arrangement, combination or agreement as illegal when the same came before this court upon an indictment held suffi-

cient in law but setting out the object and purpose of such illegal arrangement in a manner that may be termed meager when compared with the full and specific averments of the bill in this cause.

Holt's Case, 117 Tenn., 618, 629-630.

II.

Now, coming to a consideration of the merits, we respectfully insist:

The Chancellor's decree that defendant, Standard Oil Company, had violated, in the manner averred in the original bill, the provisions of the Anti-Trust Act of 1903 is abundantly sustained by the proof and warranted by the holding of this court in Holt's case, 117 Tenn., 618.

Before entering upon a discussion of the facts and the legal principles applicable thereto, we deem it proper to point out to
593 Your Honors that the scope and effect of the charges set forth in the bill in this cause are much broader than the single charge set out in the indictment in Holt's case. In that case the indictment *only* charged an agreement or an arrangement unlawfully entered into "*with a view to lessen and destroy full and free competition in the sale of a certain article of sale imported into the State, to wit, coal oil.*"

Rec., 272; 117 Tenn., 629.

In this case the bill charges that the defendant company and others unlawfully *entered* into an *arrangement*, agreement or combination *not only* for the purpose of and *with a view to lessen competition* in the sale of its oil at Gallatin, *but that such arrangement, agreement and combination tended to lessen full and free competition* in the sale of defendant's oil, *and was designed to advance, and tended to advance, the price or cost to the purchaser or consumer of defendant company's oil then being sold or offered for sale at Gallatin.*

So that in this cause the State is not restricted to proof of an arrangement entered into with a view to lessen competition, but had the right to show, and did show, as we respectfully insist, that the natural effect and tendency of such unlawful arrangement or agreement was to lessen full and free competition with defendant's
594 oil at Gallatin, and that not only was the design and purpose of said arrangement to advance the price of said oil, but that such was its natural effect and tendency.

So it is apparent to Your Honors that, under the pleadings in this case, the scope of the charges against defendant company is not so narrow and restricted as in Holt's case.

We have said, and the Chancellor so decreed, that the averments of the bill—that is, the charges against defendant—are abundantly sustained by the proof. This may be made to appear most clearly to Your Honors by setting out

A brief history of the case and outline of the facts, and considering in connection therewith the grounds upon which the

defendant asks Your Honors to repudiate and overrule your holding in Holt's case.

As early as 1893 the defendant, Standard Oil Company, a Kentucky corporation, acquired permission to carry on its business in Tennessee as an intrastate dealer. Its principal office in this State was at Nashville, in charge of an official called a "special agent," who had general charge of all its business in Middle Tennessee, East Tennessee and parts of adjoining States.

595 In 1899 it had as competitors serving the oil trade in Middle Tennessee the Miller Oil Company and the Cassetty Oil Company, both located at Nashville. The Miller Oil Company was an independent concern, having refineries of its own in Pennsylvania. The Cassetty Oil Company was also an independent concern, but owned no refineries and procured its supplies of oil from independent dealers.

In 1899, after a season of fierce competition, the defendant company either forced out of business the Miller Oil Company or purchased its plant and property at Nashville. And having disposed of the Miller Oil Company, the defendant, on October 30, 1899, entered into the arrangement or agreement with the Cassetty Oil Company set out in the amended and supplemental bill in this cause, under and by which the Cassetty Oil Company became the creature of defendant company, and continued to exist, in so far as the business of selling refined oil was involved, merely to keep up a show of competition with defendant company, when in fact the Cassetty company, for a consideration of \$500 per month, practically discontinued its business of selling refined or illuminating oils, and such oils of this character as it did sell were received by it from defendant company and sold at prices fixed by defendant company. In this way the defendant, Standard Oil Company, secured a practical monopoly of the business of selling oil in Middle Tennessee.

Amended Bill, Rec., 33-35.

Cassetty, Rec., 174-177, 185-186, 191.

McIlwaine, Rec., 197-201, 205, 209, 210.

This monopoly of the oil business by defendant continued and in 1903 its only competitor, even in name, in the Middle Tennessee territory was its creature and servant, the Cassetty Oil Company, at Nashville.

Honeywell, Rec., 145.

Collings, Rec., 367.

Prior to 1903—the exact date not being shown in the proof—defendant company had established storage tanks or depots and created a local agency at Gallatin, in Sumner County, from which it carried on the business of a local dealer in oils, supplying the trade in Sumner County and some parts of counties adjoining, without any sort of competition.

At this time the special agent of defendant company located at Nashville and having charge of its Middle Tennessee business, including Sumner County, was one J. E. Comer. The local agent at

Gallatin was one O'Donnell Rutherford, and in many other towns scattered throughout the territory subject to the jurisdiction of special agent Comer were other local stations in charge of local agents corresponding to Rutherford at Gallatin. It seems that the connecting link between this special agent or general manager at Nashville, and the local agents under his charge was one C. E. Holt, who is styled by himself and Comer a "salesman," but whose duties in fact were to visit periodically, perhaps once a month, each of the local agents and inspect the business, check up the agent and do whatever was necessary to advance the interests of his employer, the Standard Oil Company.

In October, 1903, the defendant was selling, through its local agent at Gallatin, an inferior grade of oil at the price of $13\frac{1}{2}$ cents per gallon, delivered from its tank wagon. On October 1, 1903, the capacity of defendant's storage tanks at Gallatin was 373 barrels, and stored in said tanks (Rec., 241) were 15,363 gallons of oil, the inferior quality of which, and that it was giving general dissatisfaction to defendant's customers, are abundantly established by the proof.

Roseman, Rec., 128.

Honeywell, Rec., 134.

Lane, Rec., 64, 65.

Cron, Rec., 77.

Hunter, Rec., 90, 91.

At this point it is proper to note that oil in barrels sold at $21\frac{1}{2}$ cents per gallon more than tank oil.

Coons, Rec., 239.

Thus matters stood when, after defendant company had been occupying this territory for years without competition, one Roseman, a traveling salesman for the Evansville Oil Company, one of the few independent oil companies doing business in this country, had the temerity to invade the Gallatin territory, and upon offering a superior grade (48 gravity) of Pennsylvania oil (Rec., 120), worth at least $21\frac{1}{2}$ cents per gallon more than that sold by defendant company, succeeded in selling, on October 5, 1902, at $14\frac{1}{2}$ cents per gallon, some sixty or seventy barrels of oil to different merchants in and about Gallatin, among whom were the customers of defendant company referred to in the bill from whom Roseman secured orders as follows:

From S. W. Love an order for ten barrels of oil;

From W. H. Lane an order for five barrels of oil;

From J. E. Cron an order for five barrels of oil;

From L. C. Hunter an order for six barrels of oil.

These merchants had the privilege of returning these barrels at \$1 each, which would reduce the net cost of their oil to about $12\frac{1}{2}$ cents per gallon.

Harris Brown, the county court clerk of Sumner County, who seems to have been watching Roseman with a view of making him pay taxes if he did more than to take orders for oil, is of the opinion that C. E. Holt, the traveling inspector of defendant

company, referred to above, was cognizant of Roseman's efforts to secure orders from the customers of defendant.

Rec., 106.

But, however that may be, the fact is that notice of Roseman's invasion of the territory preempted by defendant company reached special agent Comer at Nashville within a few days, and thereupon Comer, after strenuous efforts, located Holt at Monterey, and, as Comer says, he "*wrote him to go to Gallatin * * * and hold the trade if he could.*"

Comer, Rec., 288.

Holt says that he was at Monterey when Comer communicated with him, and that he was instructed by Comer to go to Gallatin "*and look after the business and countermand those orders.*"

Holt, Rec., 317.

Holt further testified (Rec., 329) that he was under the directions and control of Comer as his superior officer, and that, as directed, he went to Gallatin. In the cross-examination of Holt we find the following:

600 Q. That was when Mr. Comer directed you to go to Gallatin and secure countermands of the orders?

A. Yes, sir.

Q. Those were the instructions you received from Mr. Comer?

A. Yes, sir.

Q. Of going to Gallatin and securing a countermand of those orders?

A. That was not the specific instruction; he told me to go to Gallatin, hold that trade, and if possible, of course, secure the countermand of those orders.

Q. You went under those general instructions?

A. Yes, sir.

Holt, Rec., 329-330.

In this connection it is proper to note that Comer practically admitted that it was a part of Holt's instructions to secure a countermand of the orders taken by Roseman, and stated in substance, when asked if he did not give Holt *carte blanche* as to the methods he should use to hold his trade, that Holt *had been instructed and understood his duties.*

Rec., 289.

And so, having been directed by defendant's special agent, having full charge and control of his actions, to go to Gallatin and hold his trade and secure the countermand of the orders given by the different merchants to Roseman, Holt went to Gallatin without delay, and he says that the first merchant he called upon was Mr. S. W.

601 Love, who told him, in substance, that he had bought a better quality of oil from Roseman than was being sold by defendant company, and after deprecating the loss of Love's custom, Holt testifies that he said to him:

I said to him we wanted his business and I told him I *hated to see that oil come in there* for it looked bad for the agent over there

not being able to hold his trade, and Mr. Love told me he bought the oil, if I am not mistaken, a little bit cheaper and it was put up to him as a better quality, the salesman having a lamp showing how it burned. I asked Mr. Love if there was any way I could induce him *not to take the oil*. He said there was not; that he had ordered it and he guessed he would let it come. Well, I talked to him in that strain, about the agent and wanting his business, and I found I could not do anything with him, so I offered him one hundred gallons of oil if he would countermand the order, and he said "I will do it."

Rec., 318.

Thereupon, Holt wrote out a telegram, addressed to the Evansville Oil Company, directing the countermand of his order, and this was signed by Love, sent and paid for by Holt and the expense thereof charged and reported to defendant company.

Rec., 318, 336, 337.

Mr. Love, whose deposition was taken by the defendant and read by complainant, does not refer to any argument offered by Holt other than the proposition to bribe him to countermand his order. Love testified that Holt and Rutherford came to his store and when asked, "What passed between between you all?" he replied: 602 He (meaning Holt) came in and asked me, said "What will you take to countermand that order?" And I said "What order?" And he said "This ten-barrel order you bought from Roseman?" I said "I don't know; what will you give me?" He said "I will put you one hundred gallons of oil in the tank, if you will countermand it." I studied awhile, and told him I would do it. You see, I got more out of the hundred gallons than out of the ten barrels, and no trouble, so I turned it down right straight.

Rec., 45.

Thereupon, on the same day, October 12, 1903, he signed the telegram prepared by Holt and sent to the Evansville Oil Company countermanding his order for ten barrels of oil.

Rec., 45.

The one hundred gallons of oil were furnished to Love the next day.

Rec., 47.

W. H. Lane, who had ordered five barrels of oil from Roseman, was, after some little difficulty, induced to countermand his order in consideration of receiving fifty gallons of oil, which he received from defendant's agent at Gallatin.

Lane, Rec., 59-60, 65, 67, 74.

To J. E. Cron, who had given an order for ten barrels, Holt offered at first fifty gallons, but Cron had heard of Love receiving 603 one hundred gallons and so he stood out for that amount, and it was finally given in consideration of his executing a countermand of the order given to Roseman.

Cron, Rec., 77, 78, 82, 83.

L. C. Hunter, who had given Roseman an order for six barrels, was induced by the promise and delivery of fifty gallons of oil to countermand that order.

Hunter, Rec., 90-92, 95-97.

Holt had each of these merchants send a telegram to the Evansville Oil Company countermanding their several orders, and the cost of sending said telegrams was paid by the company, as stated above.

Love, Cron, Lane and Hunter entered into these arrangements with Holt as the agent of the Standard Oil Company and no effort was made by the Standard Oil Company to collect from them the price of the oil, nor any claim made against them by defendant therefor.

In addition to the three hundred gallons of oil given to Love, Lane, Cron and Hunter for the purposes above stated, Holt offered several hundred gallons of oil to other merchants—Douglass, Brentlinger and Fitzgerald—who had given orders to Roseman for a considerable quantity of barrel oil, but who refused to be bribed

604 to break their contracts for the benefit of the Standard Oil Company—these men spurned Holt's offer—Fitzgerald said: "I would not do a thing like that."

Even Cron, notwithstanding his cupidity, seemed reluctant and was slow to enter into the scheme proposed by Holt. Rutherford said of him: "He had to study it over—he belongs to the church."

Rec., 307.

In the meantime the orders which Roseman had taken had been delivered by him to the Evansville Oil Company, who at once directed the shipment of the oil from Oil City, Pennsylvania, to Gallatin, so that, when the countermanding orders were received the oil was en route from Oil City, Pennsylvania, to Gallatin, which point it reached about November 1 and deliveries were made to merchants not countermanding their orders, but it was necessary to store the balance of the oil at Gallatin until a purchaser could be found therefor.

It is significant to note that Comer and Holt, anticipating just this condition—that is, that the Evansville Oil Company would either have to sell at Gallatin the oil for which orders had been countermanded and thereby become a local dealer subject to
605 a privilege tax or ship the same to another point—had busied themselves—Comer with the Comptroller of the State and Holt with the county court clerk—to see that the privilege tax imposed upon dealers in oils was collected off of the Evansville Oil Company; so that, by reason of the arrangement and combination between defendant and its agents and Love and others, the Evansville Oil Company was forced to pay storage and taxes to the amount of about \$68, which more than swallowed up its expected profits upon this oil, and resulted in forcing it to abandon the territory.

Rec., 135.

Mr. Holt very complacently admitted that the Evansville Oil Company after this experience did not again invade his territory.

Rec., 348.

In the meantime the Standard Oil Company, taking advantage of its acts which had resulted in completely eliminating competition with its oil business at Gallatin, advanced the price of its inferior grade of oil then stored and being offered for sale at Gallatin, as above shown, from $13\frac{1}{2}$ to $14\frac{1}{2}$ cents, and at other places in this territory it went up 2 or 3 cents.

Roseman, Rec., 118, 126.

In the Holt case, as it will appear from an inspection of the testimony of Comer, Rutherford and Holt, the three witnesses, 606 officers and employes of said company, no effort was made to contradict the testimony of Roseman in respect of the advance of defendant's oil immediately following the elimination of competition at Gallatin, but in this case the defendant took the deposition of its special agent at Louisville, one S. W. Coons, who exhibited with his testimony certain tables purporting to show the prices of oils at different places in Tennessee and the manner in which such prices fluctuated, from which it is claimed that the increase in the price of oil at Gallatin shortly after the transactions herein complained of was but the natural and usual increase, but Your Honors' particular attention is called to the fact that prices are given as of January 1, 1903, then of about June, 1903, and then we have two increases, one on October 20, 1903, and the next on October 26, 1903, at many of the places named in the schedule.

Further, we call particular attention to the fact that while oil was sold at Gallatin at $13\frac{1}{2}$ cents per gallon, it was sold at Clarksville, on the same line of railroad and about the same distance from the refinery at Whiting, at 13 cents per gallon, and at Nashville oil was sold at $12\frac{1}{2}$ cents per gallon.

607 Further, *there is nothing in the testimony of Mr. Coons to show the grades of oil to which these different prices set out in the schedule apply*, and from the testimony of Roseman (Rec., 128), as well as the common knowledge in reference to such matters, we know that there is a great variety of oils of different grades which command different prices. If anything can be deduced from the schedule of prices appearing in this record (p. 244 *et seq.*) it is that said prices seem to be fixed in the most arbitrary manner, without regard to locality or conditions.

Further, there is no denial of the testimony of Honeywell that where defendant, Standard Oil Company, has competition, it sold the same grade of oil that it was selling at Gallatin at much less price than it was charging at that place; that the price of $13\frac{1}{2}$ cents per gallon for the grade of oil being sold at Gallatin was excessive, and in fact was 4 or 5 cents per gallon more than defendant company was charging for the same grade of oil at other places having equal transportation facilities, and where the difference in cost would not be more than one-half of 1 cent per gallon.

Rec., 143-144.

And now Holt, having accomplished the purpose for which he was sent to Gallatin, returned to Nashville, where, not later than the following Saturday, he saw Comer, and while he admits that

608 he told Comer about securing the countermand of the orders, yet he claims that he did not tell Comer about giving away the oil, and he says that he did not tell Comer because he had come to think that perhaps Comer would not like it, and that he, Holt and Rutherford, could pay for the oil before it was discovered.

As to the claim that defendant did not authorize Holt to give away oil or know that he was giving away oil in its interest to induce the Gallatin merchants to countermand their orders given to the Evansville Oil Company.

We respectfully insist that it is immaterial whether defendant company expressly and in terms authorized and directed Holt to give oil to the Gallatin merchants to induce them to countermand their orders, or that it was in fact actually cognizant of his doings in this respect at the time, because, upon the proof in this record, it cannot be doubted that defendant company, alarmed at the prospect of competition in its oil business at Gallatin, sent Holt there to protect its business from competition, and this end could best be obtained by securing the countermand of the orders given to the Evansville company. The express instructions given by Comer to Holt to go to Gallatin, hold the trade there, and secure the countermand of the orders, could have no other meaning. Securing the countermand of the orders would hold the trade—securing a countermand of the orders would remove a competitor from the field, 609 and we respectfully insist that, upon the testimony of Comer and Holt alone, that he was sent to Gallatin to hold the trade of defendant at that place and secure the countermand of the orders given to a competitor, would inevitably tend, not only to lessen but to absolutely remove, full and free competition with defendant's oil business at Gallatin. Such an arrangement or agreement, whatever you may call it, comes within the express terms of the statute, without regard to the *view* or purpose with which such an arrangement was entered into.

We ask the attention of Your Honors to that provision of the statute which makes unlawful an arrangement, combination or agreement which *tends to lessen* full and free competition. As above shown, Holt's case (as we call it) only involved the charge that the unlawful arrangement or agreement was entered into *with a view and for the purpose* of lessening full and free competition. So that, in Holt's case, it was essential that the proof respond to the specific allegation or charge made against the defendants.

In this case we respectfully submit and insist that it is not necessary to prove that this arrangement was entered into with the specific purpose to lessen competition, but it is sufficient to prove that 610 the arrangement entered into between the Standard Oil Company and its agents tended to lessen full and free competition with its oil business at Gallatin.

The Supreme Court of the United States, in construing a statute declaring illegal "every contract * * * in restraint of trade," held that the government, to maintain a suit thereunder, is not obliged to show that the agreement was entered into for the *purpose*

of restraining trade; if such restraint is its necessary effect the intent is immaterial.

United States v. Freight Association, 166 U. S., 291, 342.

Then, we ask, how much less important it is to show that the *purpose* was to lessen competition if the statute brands as illegal an *arrangement or agreement* which merely *tends to lessen* full and free competition?

However, while we do not think it was necessary to show that the arrangement or agreement was entered into for the purpose or with a view of lessening competition, yet we insist that, upon all the facts, such purpose is fully proven, as we shall hereafter endeavor to demonstrate.

But the surprising claim insisted upon with some degree of seriousness is made that defendant did not know about the giving
611 away of the oil—that is, that its managing agent and superintendent, Comer, did not know that such thing was to be done or was in fact being done, but that Holt, upon his own responsibility and upon his own account, gave away not only three hundred gallons of oil to Love, Lane, Hunter and Cron, but offered to give away several hundred gallons in addition to other merchants who refused it, intending to pay for it all himself.

It cannot be contended that Rutherford expected to pay for this oil. Rutherford merely did what Holt told him to do, and he in his testimony clearly shows that he expected Holt to settle for the oil and square him with the company, and this Holt practically admits. As shown, the Gallatin merchants dealt with Holt and Rutherford as the agents of defendant, and Rutherford obeyed without question Holt's instructions, because, as he told Comer, he "*thought Holt was his boss and he had a right to do it.*"

Rec., 305.

At this time Holt was receiving a salary of about \$65 per month, and it is expected that this court will believe that he, upon his own responsibility and his own account—when he was in no way responsible for the invasion of the Gallatin territory by the Evansville Oil Company—gave away and offered to give away oil in value of more
612 than one month's salary. As will be hereinafter shown, the price of this oil was charged to poor Rutherford, and at the time of the trial of Holt's case in the Circuit Court at Gallatin in September, 1904, when both he and the defendant company were convicted under the statute in question, Rutherford was still bearing the burden and Holt had never either paid him or offered to pay him. We say that Rutherford was bearing the burden only upon the assumption that full faith and credit can be given to the statement of Comer to that effect; but we respectfully insist, bearing in mind all that is due to a man who is now dead, that Comer's statement in this respect is not entitled to any more credit than his many other statements in this regard, which are abundantly discredited.

Further, it is claimed that poor Rutherford not only continued to bear his burden after he had been compelled to leave the company on account of ill health until some time in 1906, when Mr. Holt in his

testimony in this case says that he paid Rutherford the price of the oil, upon the request of Mr. Comer.

What happened after Holt had carried out his instructions and destroyed competition at Gallatin?

As above stated, Holt having in a most satisfactory manner accomplished the purpose for which he was sent to Gallatin, returned to Nashville and no doubt he and Mr. Comer greatly felicitated themselves over his success in removing defendant's
613 Gallatin oil business from the possibility of competition.

Now, as stated, Holt says that while he told Comer that the orders had been countermanded, yet he did not tell him about giving away the oil, but it must be borne in mind that Holt made a *daily report of his doings in writing*. This report, which showed the countermanding of the orders, was made in triplicate, in accordance with the rules of the company, and one report he kept, one he mailed to Comer at Nashville, and the third he mailed to the Cincinnati office.

Rec., 333, 321.

Now, although it is shown that from the Saturday after his doings at Gallatin, he saw Mr. Comer oftentimes and talked over the company's affairs with him, and the success of his efforts in eliminating competition at Gallatin by securing the countermand of the orders, yet he seems to seriously state that while he told Comer about the countermand of the orders, Comer did not even ask him how or by what means this had been accomplished.

Rec., 334-335.

Comer also states that it was a part of Holt's duty to make a daily report in writing—that the report of his doings at Gallatin was in the office at Nashville as a part of the records thereof, when
614 he testified in September, 1904, on the trial of Holt's case at Gallatin, and that he *could not recollect what was in that particular report* (Rec., 291), and when Holt returned from Gallatin Comer admits that he probably told him about his success in securing the countermand of the orders, but would have the court believe that he was not informed in regard to giving the oil away by his testimony as follows:

Q. Did you ask him about his success, or did he tell you anything about it?

A. I probably did.

Q. What did he say to you about it?

A. I cannot recall the conversation now.

Q. You cannot give me any of it at all?

A. No, sir.

Q. Did he tell you that he had gotten these men to countermand?

A. *He probably did*; if he succeeded at that time in countermanding.

Q. Did he tell you how he had gotten them to countermand?

A. No.

Q. You are positive about that?

A. I am positive about that.

Q. You remember, though, now, you are positive he did tell you he got them to countermand?

A. I say I am not positive that he did tell me, I say if he countermanded at that time it was more than likely he told me.

Q. Isn't it more than likely he told you how he did it?

A. No, it is not.

Q. Why is it he didn't tell you about it; what makes you think it is not likely he told you?

615 A. Well, I think it is, because *he probably* did not tell me that he had given the oil away.

Q. He didn't report any sales for that day?

A. I cannot say that he did or did not; *the report will show.*

Rec., 292.

No doubt Your Honors will regard this statement that Holt *probably did not tell him* as most surprising. It certainly was surprising to the counsel for the State cross-examining Comer, because, later on, this question was put to Comer: "*And at no time you state did he ever tell you, or did you ask him, how he managed to get those men to countermand these sales at Gallatin*" and he emphatically answered, "*No, sir.*"

Rec., 293.

We ask the court what degree of credit can be given to this statement? The only possible reason which charity can suggest for Comer's statement that he did not ask Holt as to the means used by him to secure the countermand of those orders is that he did not need to ask—that he knew in advance what was to be done—because, as he testifies, *Holt had been instructed* and understood his duties; moreover, whenever defendant's trade was threatened, a "salesman" like Holt, was immediately sent into that territory, and being instructed as to what to do, doubtless it was unnecessary to specifically renew the instructions.

Rec., 289, 293.

616 The discovery that the means used to countermand the orders were known to the Evansville company and that the newspapers were threatening prosecutions against the Standard Oil Company under the Anti-Trust Act caused Comer to be greatly agitated and to begin preparations for a way of escape for the Standard Oil Company.

We have pointed out that Comer and Holt both denied that the means used to secure a countermand of the orders at Gallatin were discussed between them and that Comer testified that Holt *probably* did not tell him what the means used were.

It is proper here to note and bear in mind that no claim is made that Rutherford, when he was assisting Holt in giving away the oil at Gallatin, had any personal knowledge whether Comer was advised as to what was being done—Rutherford simply looked to Holt to square him with the company, because he regarded "*Holt as his boss.*" However, a time did come when Comer began to deny

strenuously that he knew of the means used to countermand the orders at Gallatin, but it is significant that he made no such denial until he became advised that the culpable means used at Gallatin to rid the Standard Oil of competition were known not only to the Evansville Oil Company but that the newspapers were advised in regard thereto, and were threatening the Standard Oil Company with prosecutions under the anti-trust act.

617 Let us see what had been happening during the months of October, November and December. Love and the others had countermanded their orders and received the oil given to induce such action. The Evansville Oil Company had been driven from the field of competition, and the months of October, November and the greater part of December passed and no charge or claim had been even suggested or made against Rutherford for any deficit in the amount of oil in his charge, but some time in December the Gallatin newspapers began to threaten prosecutions under the anti-trust act which, as Holt says, very much agitated Comer (Rec., 336), and no doubt his agitation was greatly increased by the discovery from Honeywell, one of the agents of the Evansville Oil Company, that the means used to eliminate that company from the field of competition at Gallatin were well known to it, and thereupon Comer says that he sent for Rutherford on or about December 23, and *on December 24 wrote to Holt at Dickson*, telling them, in effect, that they had no right to give away the oil and that such course was foreign to the *general policy* of the Standard Oil Company.

In view of all the facts and circumstances, it is impossible to believe Comer's statement. The testimony of the witnesses for defendant is very much mixed and confused when they attempt to show 618 just how Mr. Comer, the managing agent of the Standard Oil at Nashville, came to be enlightened as to the giving away of the oil at Gallatin. Comer first stated that Rutherford's stock report showed a shortage and *he directed Mr. Wilson*, an employé under him, *to call Rutherford's attention to it over the telephone* and ask him to come to Nashville, and Rutherford did so that afternoon (December 23), and disclosed to him that he had given away under the directions of Holt three hundred gallons of oil, and that this accounted for his shortage in stock, and he says that was his *first knowledge* that the oil had been given away.

Rec., 285-286.

Further on, he stated that "*the first information was given me by Mr. Honeywell*," who came into Comer's Nashville office on December 23.

Rec., 294-c.

Now, just which of these statements is correct, as to who first gave the information to Comer, we leave the court to determine. Frankly, we do not believe either statement.

Defendant's witness Whitesides testified that some time in December he told Wilson, Comer's assistant, about Holt having given away the oil, and that that was the cause of Rutherford's apparent shortage in stock.

Rec., 297.

619 Wilson testified that Whitesides did tell him some time in December about Holt giving away oil. This conversation with Whitesides was at the union depot, and that he reported the matter to Comer immediately on returning to the office, and that thereupon Comer himself talked the matter over with Rutherford over the telephone.

Rec., 375.

Now, Rutherford testified first that his shortage was known in November.

Rec., 308.

Then he insisted that it was not shown until the end of November, and that they, meaning Wilson or Comer, wrote him a letter about the 6th or 7th of December in regard to the matter. (Rec., 304.) But this letter was never produced, either by Rutherford or any other official of the defendant, although it is shown that defendant kept copies of all its correspondence. If there was nothing in it but a mere inquiry in regard to shortage in stock defendant unquestionably would have produced it.

Indictment Follows Disclosures.

As was indicated in the newspaper articles referred to by Holt, the people at Gallatin were aroused, and later on, when the facts became fully known, the Standard Oil Company, Holt and

620 Rutherford, were indicted at the May term of the Circuit Court of Sumner County for violating the provisions of the anti-trust act of 1903.

Upon the trial of that cause at the September term, Rutherford, Comer and Holt were all examined on behalf of the defendants. Since then both Comer and Rutherford have died and their testimony as it appears in this record, was as given by them on that trial. Holt was examined anew. Upon the trial under the indictment in the Circuit Court at Gallatin and during the examination of Holt, he was asked about a certain letter purporting to be dated December 24, 1903, and purporting to be addressed to him from Comer, special agent, and a copy thereof seems to have been presented to him for identification. A copy from that copy so appearing in his testimony was injected into this record.

Rec., 343-344.

This letter was one step taken by Comer in preparing a way of escape for defendant company. A careful reading of it discloses that he made *no express denial* in this letter that he knew what had been done at Gallatin in respect of giving away oil, but the letter shows that it was carefully prepared and that the impression sought to be created thereby was that his first information in regard to the giving away of the oil had just come to him from Rutherford. This, he says, "is entirely foreign to our general policy."

Rec., 343, 344.

We do not deem it material to particularly notice this letter, because, upon proper exception, it was excluded by the Chancellor for

the reasons that it was merely a copy of a copy, and the proof showed that the original of said letter had been given by Holt to Comer and that a letter press copy thereof was in the Nashville office.

Rec., 398, 338, 347.

The action of the Chancellor in sustaining this exception was made the ground of error No. 16 assigned by defendant. (Brief, 54-55.) While it is doubtful whether, under the rules of this court, any consideration can be given to this error as assigned, nevertheless we point out to Your Honors that learned counsel do not in any manner suggest any sort of reason why the Chancellor erred in his ruling, and there can be no question but that his ruling was sound—the original letter or the letter press copy should have been produced—both were shown to be in the possession of the defendant.

Moreover, we call Your Honors' particular attention to the fact that *this letter is dated December 24*, and it was claimed to
622 have been mailed to Holt at Dickson, when in fact on that date—it being the day before Christmas—*Holt was in Nashville*.

Rec., 337, 338.

So this is another circumstance pointing to Comer's preparation of a defense for defendant company in which Holt was evidently concurring.

And here we submit that—

The Chancellor properly excluded oral testimony in relation to Holt's report of his doings at Gallatin, and also certain copies of letters exhibited with Collings' testimony, and claimed to have passed between him and Comer in the latter part of December, 1903.

We will first notice the copies of the letters produced by Collings, and in considering these letters it is well to bear in mind that the contest in the Circuit Court in the criminal case against Holt and defendant, Standard Oil Company, in view of the particular charge contained in the indictment, centered around Comer's knowledge of the means used by Holt in countermanding the orders at Gallatin. These letters, if they ever had any existence at all, were written between December 24 and December 28, 1903, before any prosecution or suit of any sort had been instituted in relation to the matters in controversy. These letters, if genuine, might have tended toward
623 sustaining the claim made by Comer that he did not know that Holt was giving away oil at Gallatin—for such purpose they are put into this record. At the time of the trial in the Circuit Court in September, 1904, there is no pretense but that copies of the alleged letters written by Comer to Collings, the vice president of the company in charge of the office at Cincinnati, were in the possession of Comer in the Nashville office, and that the original letters written by Collings to Comer were in his office. Yet, not only was Collings not examined upon the trial of the criminal prosecution, but Comer, who was examined on behalf of defendant, Standard Oil Company, does not in any way refer either to the letters or

to the matters therein contained. These letters, under date of December 26, from Collings to Comer, under date of December 26 from Comer to Collings, and under Date of December 28 from Collings to Comer, are found in the record at pp. 354-357.

We do not believe that any court would exonerate defendant, Standard Oil Company, on account of any matters contained in these letters, because it is manifest that they were concocted after the unlawful arrangement and agreement had been carried into effect—after competition at Gallatin had not only been lessened, but removed, and at a time when the sole concern of Comer was to prepare a way of escape for defendant Standard Oil Company.

624 It would seem from one of these letters that he was consulting counsel, preparing a defense, based upon his alleged lack of knowledge that Holt had given away oil, but when defendant, Standard Oil Company, was being tried under a criminal charge at Gallatin he opened not his mouth in regard to this letter.

Mr. Collings, it seems from his letter of December 28, was of the opinion "*that the matter will blow over.*"

Rec., 357.

However, it did not blow over.

Now, we ask Your Honors to note that these letters did not come from any one who testified that he was acquainted with their contents. It is true that Collings produced these copies, but he does not even say that these are exact copies of any letter written by him or received by him. The introduction of these letters as evidence was specially excepted to by the State on the trial in the Chancery Court, and excluded by the Chancellor, for the reasons stated in the exceptions. (Exceptions Nos. 8, 9, 10.)

Rec., 398, 399.

Learned counsel do not even suggest to Your Honors any reason why the Chancellor erred in excluding these letters.

625 Further, we call the attention of Your Honors to this:

Holt in his testimony taken in this cause testified that he was on tenterhooks during the time he claims Comer was in correspondence with Collings; yet he admits that throughout this examination in his own behalf on the trial of the criminal case at Gallatin nothing was said about Comer writing to Collings, or that he, Holt, feared he would be discharged by reason of what he had done. In fact, this official seemed appreciative of his efforts in holding the trade.

Rec., 346-348.

Further, Mr. Collings was good enough to admit that while he was producing the three letters above referred to he did not offer or produce the entire correspondence between himself and Comer on the subject of giving away the oil.

Rec., 364.

Now, as to Holt's report in writing of his doings at Gallatin.

It is clearly shown in the proof that under the rules of defendant company (Rec., 321) it was Holt's duty "*to make in writing a complete report every day of pretty nearly everything*" he said or did.

These reports were made in triplicate, one of which he kept, one he mailed to Comer at Nashville, and one to the Cincinnati office.

Rec., 321-323.

626 Neither of these reports so made by Holt was produced on the trial, and defendant attempted to prove by oral testimony of Comer, Collings, Holt, Wilson and Mr. Vertrees that such report contained no references to any giving away of oil. The testimony of these witnesses in respect of the contents of this report was made the subject of complainant's exceptions Nos. 1, 2, 3, 6 and 11, upon the ground, in brief, that defendant had failed to properly account for the original reports, and therefore oral testimony was inadmissible to prove their contents. Each of said exceptions, for the reasons specifically stated therein, was sustained, and the testimony of each of the witnesses named above on this point was excluded.

Rec., 395-400.

The action of the Chancellor in excluding this testimony is assigned as error, and on pages 57 to 62 of defendant's brief appears a discussion of the reasons why the Chancellor should have admitted this oral testimony.

We submit, first, that learned counsel for defendant wholly fail to suggest any good reason why this oral testimony should have been admitted when they utterly failed to account for the original report.

627 In considering this question, it is proper to bear in mind that each of these triplicate reports was an original, so that before secondary evidence was admissible as to the contents of said reports, all of them must have been shown to have been unintentionally lost or misplaced without the fault or design of the defendant or its officers.

2 Wigmore on Evidence, Sec. 1232.

In *Philipson v. Chase, 2 Campbell*, 110 (cited by Mr. Wigmore at Sec. 1232), it is said:

If there are two co-temporary writings the counterparts of each other, one of which is delivered to the opposite party and the other preserved as they may both be considered as originals and as they have equal claims to authenticity, the one that is preserved may be received in evidence without notice to the one which has been delivered.

Further, Mr. Wigmore says, Sec. 1233:

All the duplicates or multiplicates are parts of the writing itself to be proved. No excuse for the nonproduction of the writing itself can be regarded as established until it appears that all of its parts are unavailable.

Now, it is to be borne in mind that Holt kept one of these triplicate reports, but there is absolutely no effort made by defendant, although Holt was on the stand, to have him produce the copy kept by him or to account for it in any way.

628 Further, the question as to the contents of this report was a burning issue on the trial of the criminal case at Gallatin, as shown by Mr. Vertrees in his testimony (Rec., 382) and as appears by the opinion of this court when the case was determined

by Your Honors. On the trial of the case at Gallatin, Mr. Comer, after stating that he had no recollection of its contents and that he could not from memory give any idea as to what it contained, stated that the report made to him by Holt was at that time in the Nashville office.

Rec., 291.

And further, he reiterated this statement and referred to it as being in Nashville as a part of the records of the office there (Rec., 294-D); and that is the last definite information we had of the report that went direct from Holt to Comer and was deposited among the records of the Nashville office, and was there in September, 1904, during the trial of the criminal case at Gallatin.

Now, as to the report which went to the Cincinnati office, Mr. Collings, the only official from that office who testified in this case, stated that he does not recollect that he ever saw it.

Rec., 371.

Mr. Wilson, formerly assistant to Mr. Comer, attempted to testify in regard to the contents of the report, but he does not show
629 that he saw the specific report that went from Holt direct to Comer, and moreover, as shown above, one of the reports was still in the possession of Holt, another still in the Nashville office, and the third at the Cincinnati office.

It is true that the special agency at Nashville was discontinued about January 1, 1907, and the books, papers and records gone over some time later on, and the most important ones were carried to Louisville.

Collings, Rec., 351.

It is also true that in 1906 the Cincinnati office was moved from Cincinnati to Covington, Ky., and the papers gone over and a great many burned, but those of value or those which were material were kept.

Collings, Rec., 363.

But we call Your Honors' especial attention to the testimony of Wilson, who did not leave the employ of defendant at Nashville until about March 1, 1907. Wilson testified that when he left the service of the company all the papers and documents pertaining to or relating to the Nashville office were still in the Nashville office on March 1, 1907.

Rec., 378.

Now, as to Mr. Vertrees' testimony:

When this testimony is analyzed it will be seen that all
630 that Mr. Vertrees says is that a paper claimed by Comer to be the Holt report was shown to him, but he does not know where it is; that his impression is that it was not left with him, although it might have been. He states that nothing in the paper shown him referred to giving away oil.

Further, upon cross-examination, Mr. Vertrees admitted that he did not know whether the paper shown him was in the handwriting of Holt; so that all that he did know was that Comer showed him

a paper which Comer said was the Holt report. Now, the fair inference from Mr. Vertrees' testimony is that the delivery of the paper to him by Comer was before the trial at Gallatin, because he says, when the case was tried at Gallatin, "I didn't have it at Gallatin with me," and further on he says that his impression is that it was not left with him.

Rec., 282-283.

Moreover, as shown above, Comer specifically stated in his examination at Gallatin that the Holt report was at that time in the Nashville office.

Further, looking to Mr. Vertrees' testimony, we note that he refers to it as a "letter," whereas it is shown by Comer in his testimony that this report was made out upon a blank specifically prepared for that purpose.

Rec., 292.

631 Therefore, we submit that the action of the Chancellor in excluding oral testimony of this report was correct.

But we submit—

That the failure of defendant to produce Comer's letter of instructions to Holt when he directed him to go to Gallatin and hold the trade there, and the failure to produce Holt's report which is clearly shown to be in the possession of defendant or its witnesses, affords strong presumptive evidence that Comer directly instructed Holt to do what he did at Gallatin, and that Holt duly reported all that he did there to Comer.

As hereinbefore shown, Comer states that he wrote a letter to Holt at Monterey directing him to go to Gallatin and hold his trade there.

Rec., 288, 291.

No sort of offer was made to produce this letter or to account for it in any way, either the original or the office copy, which Comer was in the habit of keeping of all his correspondence.

As to Holt's report from Gallatin, which he says he was required to make in writing and therein to state pretty nearly everything that he even said or did, no effort was made to produce or account for the copy kept by Holt. The report received by Comer during the trial at Gallatin was in the Nashville office. As Mr. Vertrees says,

632 the failure to produce that report was strongly commented on by counsel for the State during the trial at Gallatin.

Rec., 382.

But that is not all. The stipulation on file in this cause shows that the criminal case which was appealed from the Circuit Court of Sumner County to this court, while tried in 1905, was not decided until February 23, 1907. In the opinion of this court, which it is agreed may be referred to, the failure to produce this report was strongly commented on.

Holt's case, 117 Tenn., 671-672.

Wilson says that all the records, books and papers pertaining to the Nashville office were in the office at Nashville; that is, *they were in said office on March 1, 1907*—six days after said decision.

Rec., 378.

And still defendant does not produce the report in its possession or ask its witness Holt for the report which he kept in his own possession under the rules of the company.

While it is true that there is no express or positive testimony that Comer authorized Holt to give away the oil at Gallatin in order to accomplish the purpose for which Comer sent Holt to Gallatin, nevertheless we insist that the failure to produce the letter of instruction to Holt and his report to Comer offers the strongest kind of presumptive evidence that the contents of that report would be against the present interest and insistence of the defendant.

Holt's Case, 117 Tenn., 672;

Dunlap v. Haynes, 4 Heisk., 476;

Kirby v. Tallmadge, 160 U. S., 232.

Further, on this point, we call the attention of Your Honors to a part of the charge of Chief Justice Shaw in the Webster case (Report by Bemis):

But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed and show that such were the truth, that the suspicious circumstances can be accounted for consistent with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge.

The decision of this court in Holt's case is the law of this case.

In Holt's case (*Standard Oil Co. v. State*, 117 Tenn., 618), this court, after full consideration and upon a record in some respects meager when compared with the proof in this case, sustaining the

contention of the State, held that when defendant's agent, Holt, acting under directions of his superior officer, the managing agent of defendant, to procure the countermand of orders given by defendant's previous customers to a competitor for the purchase of coal oil, agreed to give and did give the considerable quantities of oil shown in the proof to such customers to induce them to countermand their orders, which was done, he, Holt, violated the provisions of the anti-trust act of 1903—and that defendant was also guilty of violating said act and could be counted as one of the conspirators in Holt's case, but could not be punished by indictment and fine, as was attempted in that case.

We must confess that we do not understand whether learned counsel for defendant intend to insist that the holding of Your Honors in Holt's case should be overruled. No such insistence is expressly made. Nevertheless, we find in their brief (p. 70) the contention that what was done at Gallatin by Holt was not illegal and that it is immaterial and unimportant that he might have given

away oil to the merchants there for the purpose of stifling competition.

An examination of the opinion of this court in Holt's case will show to Your Honors that the facts were not so fully developed in that case as they appear in this record. We insist that
635 some matters which were left to inference in that case are established by positive testimony in this. Learned counsel for defendant in their brief here split hairs, we respectfully insist, upon certain parts of Your Honors' holding in the Holt case. It seems to be seriously insisted that Your Honors held that the countermand of the order by Love was not unlawful, when what Your Honors did hold was that while Love might have had a right to countermand the order, yet, if he did so by agreement with defendant and in consideration of a so called gift and for the purpose of lessening competition, such acts became unlawful, and this, we submit, is sound.

Counsel further say that Your Honors did not in Holt's case indicate that there was any evidence tending to show that there was a bad purpose and intent on Holt's part, but that a bad *purpose* was *imputed* to Love because he was bound to know, from the nature of the transaction in which he was engaged, that the Standard Oil Company or its representative, had a purpose in giving it away, and in this we entirely concur; but counsel continue and state that **Love and all the other merchants** testify in this case that they had no such purpose and made no such agreement; that is, they entered into no agreement for the purpose of lessening competition.

Now, it is true that when Love and the other mer-
636 chants were asked if they entered into any "combination" and "conspiracy" with the Standard Oil Company, etc., they answered no. Manifestly the terms "combination" and "conspiracy" frightened them.

But without regard to what was the natural tendency of the arrangements entered into between Holt under the direction of Comer and these Gallatin merchants, let us see what the parties did have in mind.

Holt says that the oil which Roseman sold to these Gallatin merchants was coming in direct competition with defendant's oil and trade there at Gallatin.

Rec., 330.

Further, he says that what he did in giving away the oil to the Gallatin merchants was done for the purpose of protecting defendant's oil stored and being offered for sale there in Gallatin.

Note his testimony:

Q. *It did protect the oil you had stored at Gallatin?*

A. *Yes, sir.*

Q. *And it was done for that purpose, wasn't it?*

A. *Yes, sir.*

So Holt's purpose and intention cannot be doubted.

637 Mr. Love says, in regard to the reason why Holt wanted him to countermand his order, that it was to prevent the oil

purchased by him from coming into competition with defendant's oil.

Note the testimony:

Q. 111. Why did they tell you they wanted to countermand that order?

A. I don't know, sir, unless it was to stop the oil from coming in there.

Q. 112. Wasn't it to prevent that oil from coming here in competition with their oil which was then being sold here in Gallatin?

A. It looks to me that it was.

Q. 114. *That was your understanding at the time, wasn't it?*

A. *Yes, sir, I think it was.*

Rec., 50.

So there can be no doubt but that Love understood the *purpose* of the arrangement being made with him.

Lane said, in substance, that the fifty gallons of oil were given to him to induce him to countermand his order to prevent the Evansville oil from coming into competition with defendant's oil at Gallatin.

638 Further on in his testimony the following appears:

Q. 172. Didn't you agree, Mr. Lane, to take that oil knowing that they were giving it to you to help them destroy competition in the sale of their oil in Gallatin?

A. I did not think anything about that.

Q. 173. Didn't you know that was what they were doing?

A. I never thought anything about it.

Q. 174. I thought you said while ago that you understood that was what they were doing.

A. I said I understood. I said I understood that was what they gave it for, to keep other oil from coming here.

Q. 175. And hence to destroy competition?

A. I suppose it would destroy competition.

Q. 176. You knew that, didn't you?

A. As a matter of course, it would.

Q. 177. That is the result it did have?

A. It seems so; we haven't had any.

Q. 178. Haven't had any competition since then?

A. Not that I know of.

Then he adds that another and higher grade of oil has been sold in Gallatin.

Rec., 68.

Further on Lane was asked:

Q. No other oil company since then has sent an agent in here to sell oil in competition with the Standard Oil Company's oil or **business here in Gallatin?**

and answered,

A. Not that I know of.

Rec., 74.

639 So that we have the direct positive testimony of Holt to the effect that his acts at Gallatin on behalf of his employer were done for the purpose of protecting his employer's oil and business at Gallatin from competition; and we have the direct positive testimony of the men with whom he made these arrangements and agreement that they knew the purpose for which it was being done, and that they foresaw the effect of such arrangements; that is, the destruction of competition at Gallatin.

Learned counsel for defendant ask: Can anything be more unreasonable or preposterous than the idea that the Standard Oil Company would give oil to merchants at Gallatin who were its customers in order to lessen competition in the sale of the particular oil it then had on hand at Gallatin, or can there be anything more unreasonable than the proposition that these merchants would enter into a combination which would have the effect of excluding a rival producer?

We simply answer these questions by the testimony of the men themselves. They admit that they knew the purpose for which it was being done, and they foresaw its inevitable consequence. The fact is they allowed their cupidity for quick profits—that is, the money they would receive from the oil given to them with-
640 out price—to overreach their judgment, and cause them to aid in not only lessening, but driving away a competitor with the Standard Oil Company, who was offering them a superior grade of oil at a price lower than they were paying to the Standard Oil Company for a quality of oil which was giving general dissatisfaction among their customers.

So, may it please Your Honors, if we were restricted to the one charge that the arrangement entered into between the defendant, Holt, Love and others was for the *purpose* of lessening competition, we submit that that charge would be abundantly and satisfactorily established by the proof in this record.

But we again call Your Honors' attention to the averments of the bill that these arrangements, entered into by Holt and Love and the defendant company, were unlawful because they tended to lessen competition, and there can be no dispute upon this record that such was their necessary, their inevitable, effect.

We have hereinbefore referred to the case of the United States v. Freight Association, 166 U. S., 291. In that case the Supreme Court of the United States was construing an act of Congress which contained the following provision: "*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of*
641 *trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.*"

In its opinion, the Supreme Court of the United States (p. 337), among other things, said:

Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world.

And responding to the *contention* that the proof must show that the particular contract under consideration was entered into with the *intent to restrain trade*, the court said:

For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the *purpose* of restraining trade or commerce, or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

The suit of the government was maintained.

In *People v. Sheldon*, 139 N. Y., 251, the Court of Appeals 642 of New York, in discussing agreements or arrangements in restraint of trade, among other things said:

Agreements to prevent competition in trade are in contemplation of law injurious to trade because they are liable to be injuriously used. * * * If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.

The cases cited by learned counsel for defendant (brief, 75, 76, 77) are clearly distinguishable from the case at bar. Moreover, in neither of those cases was there involved a statute such as controls this case. Whatever may be the general rule of law in respect of the right of a seller to collect the purchase price of an article sold to be used for an illegal purpose, it is not to be controverted that it is competent for the Legislature to make such a transaction absolutely illegal and to declare that the parties thereto shall be without remedy at law to enforce such transactions. In short, it cannot be doubted but that the Legislature has full power and authority to declare what acts are unlawful and what shall be termed agreements in restraint of trade or criminal conspiracies.

Eddy on Combinations, Sec. 356, p. 352.

643 At this point it is well to bear in mind that agreements in restraint of full and free competition were unlawful by the common law as against public policy, and among the many instances cited by Mr. Eddy as illustrative of this rule and of the limitations of the right of a trader and as an instance of an illegal act is the intentional driving away of customers by a show of violence or the inducing of persons under personal contracts to break their contracts.

1 Eddy on Combinations, Sec. 262;
Citing *Bowen v. Hill*, 6 Q. B. D., 333;
Lumley v. Gye, 2 E. & B., 216.

An arrangement with a view to lessen full and free competition or which tends to lessen full and free competition is unlawful, although

the particular means by which it is to be carried into effect were not settled and agreed upon.

In their brief learned counsel for defendant, in discussing the proper construction of the act of 1903, continually use the term "agreement" as being the only thing denounced by said act (Section 1) as illegal. The act declares illegal all *arrangements*, contracts, *agreements*, trusts or combinations made with a view to lessen, or which tend to lessen, full and free competition, etc.

Although in our opinion it is not particularly material, we
644 submit to Your Honors that the term "arrangement" as used in the act is of broader significance than the word "agreements." It may be merely an "agreement" or under particular circumstances, as in this case, it may not only include an agreement, but all the steps leading up to the agreement or by which the agreement is to be carried into effect.

The Century Dictionary defines "arrangement" as "preparatory measure or negotiation—preparation." Webster refines the word as meaning "preparatory measure—preparation." The unlawful arrangement averred in the bill was first entered into between the defendant, its special agent Comer and its other agent Holt. The purpose and necessary effect of this arrangement was to secure defendant's oil and oil business at Gallatin from competition. The express instructions as proven in this record by the positive testimony of Holt and Comer demonstrates that Holt's mission to Gallatin to hold defendant's trade there and secure a countermand of the orders for oil coming in competition with defendant's oil was an unlawful arrangement within the meaning of the act of 1903.

To effect this unlawful arrangement, Holt went to Gallatin, and there with Love, Lane, Hunter and Cron, he took additional preparatory steps to best effectuate the end in view, to wit, the
645 lessening or removal of competition with defendant's oil and oil business at Gallatin. In other words, while the unlawful arrangement or agreement originally included as parties thereto only defendant, Comer and Holt, yet in its execution it was made to include additional parties, to wit, Love, Lane, Hunter and Cron, and another agent of defendant, Rutherford.

It is well settled that any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired or entered into the original arrangement.

United States v. Babcock, Fed. Cas. No. 14487; 3 Dillon, 586.

As hereinbefore shown, an arrangement or conspiracy may be unlawful and punishable by law even when the parties have not settled upon the means to be employed—nor is it necessary to establish a conspiracy or an unlawful arrangement to show that all of the parties thereto actually came together and agreed upon the manner of carrying out the thing to be done.

As stated by this court in Holt's case, 117 Tenn., 667:

Where the offense with which the corporation is charged is the violation of a positive statute, the only intent necessary to the commis-

sion of the offense is the intent to do the prohibited act, and this corporations will be held to when they act through their authorized agents and officers.

646 And further this court, in Holt's case, recognizing the principle here contended for and holding in effect that it was immaterial whether Comer knew of the precise means by which the unlawful arrangement was to be carried out, among other things (117 Tenn., 672-676), said:

The *gist* of the crime committed is the arrangement made to lessen, or which tended to lessen, competition. This is what caused the injury to the public, and what is prohibited. It is what they conspired to do. It was not necessary that the conspirators should have agreed upon the means by which the conspiracy was to be effected. The Standard Oil Company, through its special agent, one having authority to act for it and dictate its policy in all matters concerning the marketing of its oil in that territory, directed Holt to make the arrangement, and is presumed to have been present and assenting to the means used by its co-conspirator to carry out the objects of this conspiracy. 2 Wharton's Cr. Law, 1397-1400; *Spies v. People* (Ill.), 12 N. E., 865.

Although a previous contract or agreement is essential it is not necessary that it appear that the conspirators came together and agreed upon the manner of carrying out the conspiracy; it is sufficient to prove that their acts were done with a view to accomplish the purpose of the conspiracy. *United States v. Ridskopf*, 6 Biss., 259; 6 A. & E. Enc. of Law (2d ed.), 842.

In general, a conspirator is responsible for the means employed by his fellow conspirators in accomplishing the unlawful purpose, although not previously specifically agreed upon. *Spies v. People* (Ill.), 12 N. E., 865; *Phillips v. State* (Tex. App.), 9 S. W., 557; *Irvine v. State*, 104 Tenn., 132-147; *Eddy on Combinations*, Sec. 458; *Wharton on Criminal Law*, Sec. 220.

* * * * *

And proof of an overt act is competent in cases of this kind, though the alleged preconceived plans did not necessarily include the commission of the act done, when such act is one which would tend, directly or indirectly, to accomplish the common purpose; and it is often convincing evidence of the existence of the combined intent and agreement. *State v. Ripley*, 31 Me., 386; *Martin v. State*, 89 Ala., 115.

S. W. Love was also a party to this conspiracy within the meaning of this statute. He testified upon the witness stand, when introduced in behalf of the State, that he made the arrangement when approached and asked to do so by Holt, and that he received the consideration contracted for, from the storage tank of the Standard Oil Company at Gallatin. There is no question but that he did it knowingly, and in order to carry out the purposes of the Standard Oil Company and its representative Holt. This intent and purpose were apparent and obvious, and the injurious effect upon trade and the public unmistakable. No intelligent business man could be ignorant of these things. He was bound to know, from the nature of

this unusual transaction, that the Standard Oil Company, or its representative, had a purpose in giving the oil away; that that purpose was favorable to their own interest; and that the countermand of the order he had given the Evansville Oil Company was a furtherance of that purpose, and would tend to lessen and destroy competition with the oil of the Standard Oil Company then stored and being sold at his place. He had a right, it is true, to countermand the
648 order, if that was the understanding, implied or expressed, between him and the Evansville Oil Company, but he had no right to enter into an agreement with the Standard Oil Company to do it. He lessened competition against the oil of the latter. Neither the countermand of the order nor the giving away of the oil were in themselves criminal, and either could have been done by the parties without concert, but they could not agree to have the order countermanded in consideration of a gift of oil for the purpose of lessening competition or if such countermand tended to effect that purpose.

And without further enlarging this brief, we call attention of Your Honors to the additional authorities cited in the opinion of Mr. Justice Shields, which abundantly sustained the conclusion of this court.

Holt's case, 117 Tenn., 664, 671, 676-678.

As above shown, from the opinion in Holt's case, this court held that Love—and necessarily Hunter, Cron and Lane, who, however, were not before the court in Holt's case—was a party to the unlawful arrangement and that defendant company was also to be counted as one of the parties to such unlawful arrangement, and while the case was reversed as to defendant company, because under the act of 1903 a corporation is not subject to indictment, nevertheless this court said (117 Tenn., 667):

It has not been acquitted of the charge of conspiracy.

Before closing the discussion of this branch of the case, and
649 in response to defendant's insistence that Holt's doings at

Gallatin were foreign to its general policy and were never countenanced by defendant either at Gallatin or elsewhere, we call the attention of your Honors to the testimony of O. T. Reynolds, which throws a flood of light upon defendant's "general" policy when a dealer would not purchase oil from the defendant.

Defendant attempted to arrange with its local agent, O. T. Reynolds, at Dover, Tennessee, to give away oil to the customers of a merchant to compel him to buy oil from the defendant.

In the fall of 1903, O. T. Reynolds became the local agent of defendant at Dover, in Stewart County, Tennessee, which was under and within the jurisdiction of the Louisville office presided over by defendant's special agent Coons. The tank wagon under Reynolds' charge traversed considerable territory, within which, a few miles from Dover, was a merchant by the name of Scarborough, who, it seems, was not purchasing oil from defendant company. This became known to one Carrico, who occupied the same relation to defendant as did Holt, and in January, 1904, Carrico called to the attention of Reynolds the fact that Scarborough was not purchasing oil from defendant and said: "He (meaning Scarborough) is evidently

selling another oil" (Rec., 153), and thereupon Carrico instructed Reynolds to secure some five gallon cans, have them filled and have his driver carry them along with the tank wagon and give them free of charge to Scarborough's customers, saying, "We will try and see if we cannot force him, get him, to take oil from the wagon."

Rec., 153, 154.

But it seems that Reynolds had noticed something in the papers about the Gallatin incident, and thereupon he conferred with his lawyer, Gen. Brandon, who advised him to have nothing to do with the matter, and in consequence of this advice he refused to carry into effect Carrico's instructions. At this time, Reynolds, in addition to carrying on the local agency for defendant, was operating a livery stable, and Carrico was in the habit of securing horses and outfits from him, but after Reynolds' refusal to carry into effect his instructions as above stated, Carrico ceased to have anything to do with Reynolds, and in a short time thereafter he was discharged.

Rec., 154, 155, 159, 167.

While Carrico, whose testimony was taken and read by defendant, admits talking to Reynolds about securing some cans, nevertheless he denies that he advised or suggested to Reynolds to give away oil in the vicinity of Scarborough.

Rec., 388-389.

On cross-examination, however, Carrico admitted that after his talk with Reynolds he did go to see Scarborough, and he further admitted that he had been advised as to what Reynolds had testified in this case, and that just before he, Carrico, was examined as a witness in this case, he went to see Scarborough and secured from him his *papers, invoices and correspondence*.

Rec., 390.

These papers were not offered as evidence in this cause, but does not the question naturally arise why at this particular juncture could defendant have deemed it necessary to secure from Scarborough the papers relating to his business with defendant company? Unquestionably, defendant deemed it important to secure possession of those papers.

Further, as throwing light upon defendant's "*general policy*," we call the attention of your Honors to

The contract with the Cassetty Oil Company.

Although the amended and supplemental bill, which was based principally upon defendant's contract with the Cassetty Oil Company set out in said bill, was dismissed upon demurrer, nevertheless said contract was exhibited with the testimony of William M. Cassetty, who, with McIlwaine, the president of the Cassetty Company, were examined to show that was done under said contract—all of which is in the record without objection.

31—391

652 This contract, as above stated, was entered into on October, 30, 1899, but it was a continuing contract, and the parties thereto acted under it down to November 1, 1904.

We have hereinbefore (under complainant's assignment of errors) discussed the nature and effect of this contract. In brief, it was intended to eliminate as a competitor with defendant's business at Nashville the only remaining oil dealer after the Miller Oil Company had been either driven from the field or its plant and business purchased by defendant.

Counsel for defendant attempt to castigate Mr. Cassetty on account of his connection with this case, that is, his bringing to the attention of the Attorney General the agreement between the Cassetty Oil Company and defendant. An examination of Cassetty's testimony will disclose nothing censurable—nothing which discredits him as a witness. Your Honors may eliminate from this record Cassetty's testimony, and you will find in the contract itself and the testimony of McIlwaine (who developed that he had great bitterness toward Cassetty and was a partisan of defendant Standard Oil Company) that the averments of the amended bill are amply sustained.

You will also see that this contract was carefully concealed, and an examination of the testimony of Collings, vice president of defendant (Rec., 365-366), shows that he was much moved
653 when questioned in regard to this contract, and that, when he was asked to produce it, he claimed that the copy in the possession of defendant had long since been destroyed.

Collings, when asked if his company did not make an agreement with the Cassetty Oil Company by which defendant was permitted to fix the price of oil sold by the Cassetty Oil Company, and that defendant company paid therefor to the Cassetty Oil Company five hundred dollars per month, said:

I did not consider it in that light. It was not any agreement by which we were to fix the price.

Rec., 365.

Now, according to the very terms of the contract, this answer of Mr. Collings was uncandid, if not absolutely untrue. The Cassetty Oil Company was to buy all of its stock of coal oil from defendant company. It was to act for defendant and for it alone. However, the real purpose of the agreement, as disclosed by McIlwaine and Cassetty, was to have the Cassetty Oil Company held out as an apparent competitor, while in fact it did no business in selling refined oil or what is commonly called coal oil; so that the market for this product was turned over exclusively to defendant company.

Before this contract was entered into, the Cassetty Oil Company had been purchasing oil from independent companies; after
654 it was entered into, if it sold any coal oil it was to receive it from defendant company.

Cassetty, Rec., 174-177, 185-186, 191-192;

McIlwaine, Rec., 197-201, 205, 209, 210.

It is said that this contract was entered into in Cincinnati, Ohio. It is probably true that it was signed in Cincinnati by the officials of defendant. Its execution was completed in Nashville when the officials of the Cassetty Oil Company signed it. There is no doubt but that its terms were carried into effect during the years 1903 and 1904, after the enactment of the anti-trust act of 1903 and the acts of the parties thereunder were in Tennessee.

At the termination of said contract, it was not renewed because defendant had nothing further to fear from the Cassetty Oil Company. McIlwaine says that Cassetty upbraided him in regard to this, said that they (meaning defendant) had thrown the hooks into them, said that "they had about squeezed the lemon and they had control of the marketing."

Rec., 210.

The discussion of this branch of the case would be incomplete if we did not show to Your Honors that—

Holt, for his doings at Gallatin, expected to be protected by defendant company.

As shown upon the brief of defendant, the fine assessed 655 against Holt in the criminal case was, after the judgment of the Circuit Court of Sumner County had been affirmed by the Supreme Court, paid by defendant, as were judgments for \$100 each, together with costs in the cases remaining undisposed of at Gallatin wherein indictments had been returned on account of Holt's doings with Lane, Cron and Hunter, in addition to the Love transaction. It is said that defendant agreed to pay these fines and all of this cost in order to secure a final disposition of the cases.

The purpose of defendant in paying the fines may be immaterial—it may not—certain, however, it is that the defendant did pay the fine of \$3,000 imposed upon Holt and the other fines as stated.

But that is not all. And what we are now about to refer to ought properly to have been stated in connection with the discussion of the testimony of Holt and Comer and the insistence that defendant was not responsible for what Holt did at Gallatin. Holt says that he never employed any lawyers in the criminal case at Gallatin, or to represent him in the Supreme Court, and that he never paid any lawyers for their appearance in his behalf in the criminal case (Rec., 328), and when asked on cross-examination if he claimed 656 that he had no specific agreement either beforehand or during the continuance of the criminal prosecution that the Standard Oil Company would pay his fine, he said:

I felt it that they would protect me to a certain extent; I had that feeling.

Rec., 328.

On re-examination he was asked by defendant's counsel:

Q. You have been asked if you felt that the company would protect you and you answered that you did feel that they would protect you to a certain extent; what did you mean by that?

A. *I mean that the company would help me get out of the trouble.*

So that it is not left to inference, but shown to be a positive fact, that Holt understood all the time the company would protect him—would get him out of any trouble in regard to these matters.

Moreover, a corporation is bound by the acts of its agent within the scope of his duty and will not be heard to deny that it authorized such acts, particularly when it acquiesces in and accepts the benefits of its agent's acts and doings, as did defendant in respect of Holt's acts and doings at Gallatin.

Waters-Pierce Oil Co. v. Texas, 19 Tex. Civ. App., 1, 20, 21.

Before concluding the discussion of this branch of the case, 657 and as stating our position much better than we are able to state it, we call your Honors' attention to that part of the opinion of this court, speaking through Mr. Justice Shields, in *Standard Oil Company v. State*, 117 Tenn., 659, 660, 667-669, as follows:

The making of the agreement with Love, with a view to lessen competition, and which tended to do so, is thus fully proven. This is all that is necessary to constitute a violation of this statute. The statute was not only intended to prohibit contracts and combinations between those engaged in the same business, made for the purpose, or which had a tendency to destroy all competition, and which are injurious to the whole public, but those made and formed by any and all persons with a view, or which in their nature tend, to lessen competition to any material extent, to the injury of any part of the people of the State. The number of persons generally speaking, engaged in the conspiracy, the extent of the territory affected, the degree which it was intended or has a tendency to lessen competition, the extent of the injury to the public, or whether it be permanent or temporary in its character, are not material elements of the offense. The form of the combination is also a matter of indifference. No forms or precedences are followed in the commission of crime. In any form the agreement may be made, or disguise in which it may appear, or whatever scheme may be adopted to accomplish the prohibited acts, it is within the statute. It is enough that the contract was made with a view to lessen competition in the sale of an article of commerce of prime necessity, and that it is injurious to the public, however limited and restricted it may be in its scope, effect, duration. It is its purpose, tendency and effect that makes it unlawful. Contracts of the character made by these 658 parties were unlawful under the common law, and those engaged in them subject to indictment. This court, construing a statute containing the same provisions of the one here applied, through Mr. Justice Caldwell, said:

"Courts are practically unanimous in holding that contracts, agreements, arrangements or combinations, in whatever form or name, are contrary to public policy and void, when they tend to impair competition in trade and to enhance prices to the injury of the public It is not the number of persons participating in the by-law (the illegal agreement in that case), or the extent of the territory included, but the injury to the public in that territory,

however restricted, that characterizes the interruption of trade as illegal."

Bailey v. Master Plumbers, 103 Tenn., 99, 106, 114.

We are also of the opinion that corporations and their officers and agents who conceive, effect, and carry out a conspiracy, can both be considered and counted in the two or more necessary to constitute an unlawful conspiracy. The provisions of the statute upon which this case is based settle this question. Under Section 3 all persons who may be engaged in a conspiracy, or shall, as principal manager, director, agent, or in any other capacity, knowingly carry out the stipulations, purposes, prices, rates or orders made in furtherance of the conspiracy, are made parties and upon conviction subject to punishment.

We think, under this section, all persons who concur and participate in performing and making the unlawful agreements prohibited, whether as principals or agents, are conspirators, and therefore all must be counted in the two or more necessary to constitute a conspiracy. This appears from its plain terms, and especially the provisions for the punishment of all engaged in the conspiracy, whether as principals or agents. It was the evident intent of the Legislature to, as far as possible, prevent corporations from committing the abuses of trade denounced by the statute, by making their officers and agents, without whom they could not act, guilty of the same offense.

Corporations can unquestionably commit and be guilty of a criminal conspiracy denounced by the statute, as it so expressly enacts, and they, therefore, must be counted. The only question is whether their officers and agents, when they knowingly originate, effect and carry out a criminal conspiracy, are to be considered parties to it, and held responsible for their corrupt and criminal actions. To hold that they are not would be to declare that the many able and experienced men who are now controlling and conducting the business of the corporations of this country as presidents or general managers, and the thousands of intelligent and skilled agents, mechanics and operatives of every character in their employment, are mere tools and instrumentalities of their employers, without minds, consciences and a sense of right and wrong and responsibility for their deeds. It would be to hold that they, by virtue of their corporate employment, have lost their identity, their individuality as men and citizens, and have been absorbed by a mere concept of the law, a conclusion which they would be the first to controvert and resent. If they should not be counted as parties necessary to constitute a conspiracy, they could not be guilty of a conspiracy, and the result would be that those whose minds conceived and planned and whose hands consummated a crime would not be within the reach of the law, and would escape punishment. This cannot be. No man is above the laws of his country, and no one can so subordinate himself to the will of another, or the services of another, as to be beneath them. It will be a fateful day for our institutions, founded as they are in part upon the right of independent thought and action and individual

responsibility, when the doctrine that the thousands of officers and agents of the innumerable corporations, great and small, controlling almost all of the public utilities and the commerce of this country, acting within the apparent scope of their duties, are immune from the punishment provided by statute to restrain the rapacity and aggressions of their employer, is established. Then, indeed, would these great combinations be a menace to our form of government, and the prosperity and happiness of the great masses of our people.

III.

No statute of limitations bars the State from enforcing the provisions of the second section of the anti-trust act of 1903 against defendant, a foreign corporation.

This is a suit to enjoin defendant from further carrying on within this State the business of an intrastate dealer in oil. In other words, the State is seeking to enforce, by due process of law, the withdrawal or denial of its permission to defendant to exercise its functions as a corporation in this State. The State heretofore as a matter of comity extended to defendant permission to carry on its business within her borders, but now, for failure to comply with the law of the State, that permission is withdrawn and defendant is to be treated as though no such permission had ever been extended.

661 As hereinbefore shown, defendant's violation of the anti-trust act of 1903 occurred more than three years prior to the institution of this suit, which was begun immediately after the criminal prosecution against defendant had been granted by this court. The defendant *now* insists that if it has violated the provisions of the act of 1903 it has been guilty of a misdemeanor, and therefore it sets up the statute of one year, applicable alone, as we submit, to the prosecution of misdemeanors by indictment or presentment.

Defendant insists that the act of 1903 is a "*general criminal law*," when, as we submit, said act is remedial in its nature, although by Section 3 thereof it provides for a criminal prosecution; that is, a prosecution by indictment or presentment against *natural* persons offending against the provisions of Section 1.

It is immaterial that Section 3 of said act declares that any violation of its provisions shall be deemed a "conspiracy against trade." Such declaration adds nothing to the force and effect of said section. But learned counsel for defendant insist that, because by the Code (Shannon, Secs. 6736, 6693, 6694) a conspiracy against trade is declared to be a misdemeanor, therefore the statute of limitations applicable to misdemeanors bars the State from maintaining this suit.

Your Honors will doubtless remember how, when learned counsel for defendant, Standard Oil Company, in what we call the
662 Holt case, drove home his argument that a corporation was not indictable, and that no fine could be imposed or assessed against it, under the act of 1903, that the Attorney General in this court invoked the general provisions of the Code referred to above to sustain the indictment and conviction of defendant in the Circuit

Court of Sumner County for and on account of these same matters, but your Honors held against the State and, sustaining the contention made on behalf of the defendant company, reversed the judgment of conviction and quashed the indictment.

What is a misdemeanor?

As said by this court in the case of *McGinnis v. State*, 9 Hump., 43, 50:

The terms "crimes" and "misdemeanors" in their legal significance, are descriptive of different and distinct grades. "In the English law, misdemeanor is generally used in contradistinction to felony, and misdemeanors comprehend all *indictable* offenses which do not amount to felonies." 4 Blackstone's Commentaries, 5; Note 3 by Christian.

This definition—that is, that a misdemeanor is an *indictable* offense not amounting to a felony—is given in 5 Words & Phrases Judicially Defined, 4533, citing:

In re Bergin, 31 Wis., 383, 386.

State v. Gaster, 45 La. Ann., 633.

Kelly v. People, 132 Ill., 633.

State v. Hunter, 67 Ala., 81, 83.

People v. Maxon, 1 Idaho, 330, 338.

United States v. Chapel, 25 Fed. Cas., 395.

663 By the common law the term "felony" had a distinct technical meaning—it was an offense which occasioned a total forfeiture of either lands or goods, or both, to which capital punishment or other punishment might be superadded, according to the degree of guilt.

Bouvier's Law Dictionary.

But under the American system of jurisprudence, forfeiture of lands and goods and attainder of blood having been abolished, in many of the States statutes were enacted specifically defining and marking the distinction between felonies and misdemeanors. So that this State, by the Act of 1873, Chapter 57, declared that "all violations of law punishable by imprisonment in the penitentiary or by the infliction of the death penalty, are and shall be denominated felonies, and all violations of law punished by fine or imprisonment in the county jail, or both, shall be denominated misdemeanors."

Learned counsel for defendant refers to the Act of 1873 as a "practice act"; but we submit that the clear purpose of the Legislature was to classify and grade indictable offenses against the laws of the State. We have been unable to find any case which refers to an *offense* as a "misdemeanor" *unless it is made indictable*. This idea is embodied in the Code which (Shannon, Sec. 6949) provides:

All violations of the criminal laws may be prosecuted by indictment or presentment of a grand jury, and a presentment may be made upon the information of any one of the grand jury.

664 And under our system of jurisprudence no other form of prosecution of either a felony or a misdemeanor is known save by indictment or presentment.

It is true that by the Code (Shannon, Sec. 6437) it is provided that "when the performance of an act is prohibited by statute, and no penalty for the violation of said statute is imposed, the doing of such act is a misdemeanor;" but it has been repeatedly held that where a specific penalty is provided no criminal action—that is, no action in the name of the State by indictment or presentment—can be predicated upon the act complained of. Such was the holding of this Court in the cases of

State v. Laury, 7 Baxt., 95;

State v. Mann, 6 Cold., 557;

State v. Mays, 6 Humph., 17;

Murphy v. State, 114 Tenn., 531-533.

It is interesting to consider that if Section 2 of the Act of 1903, providing that every foreign corporation which shall violate any of the provisions of said act is denied the right to do and prohibited from doing business in this State, had not been incorporated into said act, such a corporation would have been indictable for violating the provisions of Section 1 of said act, either by virtue of the Code,

Sec. 6437, *supra*, or the third section of said act.

665 But the insistence made by counsel for defendant has been ruled against defendant, not only in Holt's case, but also in the case of the State, *ex rel. v. Schlitz Brewing Co.* (104 Tenn., 715, 748-751), in which the anti-trust act of 1897, identical with the anti-trust act of 1903 except that the latter act does not contain the provisions of Section 4 of the former act, was construed by this court.

In the Schlitz Brewing Co. case, instituted in the Chancery Court of Shelby County by a bill in equity in the name of the State upon the relation of one Astor, but filed by the Attorney General, this court held that the remedy provided by Section 2 of the anti-trust act of 1903 was a *civil suit* entirely without dependent connection with either criminal prosecution provided for in Section 3 of said act of the pecuniary liability prescribed separately in Section 5 of said act.

104 Tenn., 745, 749, 751.

It is immaterial to consider whether the criminal prosecution provided for by Section 3 of the anti-trust act of 1903 shall be classed as a felony or misdemeanor, because this court has held that a corporation—this particular corporation—is not *indictable* for violating the provisions of said act, whether such violation be considered a felony or misdemeanor.

Therefore, we submit that the statute of limitations, applicable alone to criminal prosecutions, cannot be invoked in this case, because this court has held:

666 1. In the Schlitz Brewing Co. case, *supra*, that an action similar to the one at bar is a civil suit to enforce a statutory penalty.

2. In the Standard Oil case (117 Tenn., 618) that a corporation cannot be prosecuted criminally under the act of 1903, but is amenable only to the *penalty* prescribed by said Section 2 of that act.

Now, whether Section 2, declaring that a foreign corporation violating the provisions of the act in question shall be denied the right

to do business in this State, provides a "statute penalty" or a "statute liability"—the latter term we believe to be more accurate—we submit that the State is not barred from maintaining this suit to enforce the provisions of Section 2 against defendant.

It is well settled (Wood on Limitation of Actions, Sec. 52) that the statute of limitations cannot be set up as a bar to an action by the State except where it is expressly provided by statute to the contrary; and but for the limitations prescribed by statute (Shannon's Code, Secs., 6942-6945) no lapse of time could be pleaded against the State as a bar to any criminal prosecution; however, treating this suit as an action to enforce a statute penalty, we insist that the State is not barred.

637 For statute penalties, not involved in criminal prosecutions, it is provided (Shannon's Code, Sec. 4469; Code of 1858, Sec. 2772) that actions to enforce statute penalties are barred within one year after the cause of action accrued, but this provision is found in Article 3 of the second chapter of Part 3, Title 1, of the Code, and by Section 4453 of Shannon's Code (Sec. 2762 of the Code of 1858), found in the same chapter, it is expressly provided that "*the provisions of this chapter do not apply to actions brought either by or against the State of Tennessee, unless otherwise provided.*"

In the case of *O'Neil Sureties v. State*, 10 Lea, 727-729, the section of the Code just quoted was construed, and it was held thereunder that the several statutes of limitations included within said Chapter 2 do not apply to actions brought by the State.

Therefore, we respectfully insist that there is no statute of limitations in this State applicable to an action instituted by the State to enforce the provisions of Section 2 of the anti-trust act of 1903, even if such provisions be considered as imposing a statute penalty within the meaning of Section 4469 of Shannon's Code.

As above stated, we are inclined to the opinion that the term "statute liability" more accurately defines the effect of the provisions of Section 2 of the act in question, and while it is not important

to determine whether this suit is to enforce a "statute penalty" or a "statute liability," because, under the provisions of the Code (Shannon, Sec. 4453) the statute of limitations does

638 not run against the State, nevertheless it is not uninteresting to note that the Supreme Court of the United States, in *Atlanta v. Chattanooga Foundry & Pipe Works*, 203 U. S., 390, affirming the decision of the Federal Circuit Court of Appeals for the Sixth Circuit (127 Fed., 23), in construing the provisions of Section 7 of the federal anti-trust act providing that any person injured in his business by another person by reason of anything forbidden by said act may recover three-fold the damages by him sustained, etc., held that this was not a "penalty" but a "statute liability," and no federal statute applying thereto, the limitations provided by the State of Tennessee, within whose territory the suit was brought, controlled, and that Section 4469 of Shannon's Code, applicable to *statute penalties*, did not apply, but the statute of ten years (Shannon's Code, Sec. 4473,) applicable to "all other cases not expressly provided for," applied to the action brought to enforce said "statute liability."

But—

The conspiracy against trade denounced by the third section of the anti-trust act of 1903 is a felony.

For the reasons hereinbefore stated, we had not deemed it material to discuss the grade of the offense denounced by the third section of the act of 1903, but if that should be deemed material then we point out to your Honors that, under the Act of 1873, Chapter 57, the offense denounced by the third section of the act of 1903 is a felony, because it is punishable not only by a fine but by imprisonment in the penitentiary not less than one nor more than ten years; so that, treating it as a criminal offense, no statute of limitations applies to this particular felony.

Under a statute declaring that the term "felony" includes every offense punishable by imprisonment in the State prison it has been uniformly held that an offense that is *liable to be so punished* must be regarded as a felony, although not necessarily so punished.

State *v. McCormick*, 84 Me., 566;

Benton *v. Commonwealth*, 89 Va., 570;

In re Stephens, 52 Kans., 56.

In State *v. Clayton*, 100 Mo., 516, it was held, under a statute providing that the term "felony" shall be construed to mean any offense for which the offender on conviction shall be liable by law to be punished with death or by imprisonment in the penitentiary, that it is not necessary to constitute a felony that the offense be one which must be thus punished.

Johnston *v. State*, 7 Mo., 108.

Ingram *v. State*, 7 Mo., 293.

670 Further, we submit:

The provisions of Section 2, declaring that for a violation of said act a foreign corporation "is denied the right to do and prohibited from doing business in this State," are not to be considered as a "penalty," according to the legal signification of that term, but merely as a withdrawal of the State's permission to do business within her borders.

As above shown, this court has twice held that the provisions of Section 2 do not contemplate a criminal prosecution. However, in the Schlitz Brewing Co. case, Judge Caldwell, speaking for the court, refers to the provisions of Section 2 as imposing a "penalty."

As hereinbefore suggested, in our opinion the use of the term "penalty" is inaccurate. The term "penalty" usually means a sum of money payable as an equivalent or punishment for an injury. 2 Rap. & L. Law Dictionary. But in *Huntington v. Attrill*, 146 U. S., 657, it is said that a penalty denotes a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws.

The only forms of punishment known in the enforcement of the criminal law are a fine, or pecuniary penalty, or corporal punish-

ment. Certain it is that no such penalty is contemplated by the provisions of Section 2.

671 This suit may be regarded as instituted for the purpose of making a judicial record of the fact that for violating the provisions of the anti-trust act of 1903 defendant, as declared in the second section of said act, *is denied* the right to do business in this State, and to enforce such denial or withdrawal of the State's permission to do business in this State, by the injunctive process of this court.

Moreover, the State is not attempting to wrest from the defendant any *right* to which it is entitled. With the existence of defendant as a corporation this State has nothing to do, but it has everything to do with the exercise of its corporate functions in this State. Foreign corporations do business in this State not by right but by comity, and the State may impose any condition whatsoever it sees fit upon their right to do business here, or it may exclude them altogether, or it may withdraw its permission after it has been given. Beale on Foreign Corporations, Sec. 117, 118; *Hooper v. California*, 155 U. S., 648; *Mutual Life Ins. Co. v. Spratley*, 172 U. S., 672; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; *Mutual Life Ins. Co. v. Prewitt*, 202 U. S., 246; *Schlitz Brewing Co. case*, 104 Tenn., 725.

The principle here contended for is fully recognized in the case of *State v. Standard Oil Company*, 61 Neb. 28 (87 A. S. R., 449), a proceeding instituted by the State of Nebraska to exclude the Standard Oil Company of Indiana from doing business in
672 that State under the provisions of the Nebraska anti-trust act, which provided, among other things:

Every foreign corporation or person not a resident of this State violating any of the provisions of this act, *is hereby denied the right and prohibited from doing any business within this State.*

In construing said act, the Supreme Court of Nebraska, among other things, said:

Foreign corporations do business here not by right but by comity; *Paul v. Virginia*, 8 Wall., 168; *Western Union Tel. Co. v. Mayer*, 28 Ohio St., 521. The State grants them a privilege which it may revoke at pleasure. When they exercise their franchises in contravention of our laws, the privilege is revoked, and, that fact being ascertained, judgment may be rendered excluding them from the State. *The revocation of the permission* given a foreign corporation to do business here *is not the infliction of a penalty*; it is not the deprivation of a right. The privilege is like any other license, and the withdrawal or cancellation of it in consequence of the commission of a crime is not punishment in a legal sense: *Martin v. State*, (Neb.), 36 N. W., 554; *Miles v. State*, (Neb.), 73 N. W., 678; *State v. Harris* (Minn.), 52 N. W., 387, 531.

In further recognition of this principle it was held by the Supreme Court of Ohio, in *Western Union Tel. Co. v. Mayer*, 28 Ohio St., 521, that the privilege or permission which a foreign corporation enjoys by legislative consent of exercising its corporate powers and

of carrying on its business in a State is not *property*—it is
673 a mere license or permission extended by comity and which
may be revoked at pleasure.

Your Honors will see, by an examination of Boyd's case, 116 U. S., 616, cited on defendant's brief, that the question there decided was not at all analogous to the questions before your Honors. Moreover, in that case the Supreme Court of the United States was giving effect to the fourth and fifth amendments to the Federal Constitution, which were designed solely to limit the powers of the Federal Government.

IV.

That the provisions of Section 2 of the anti-trust act of 1903 may be enforced against a foreign corporation by bill in equity was expressly adjudicated in the Schlitz Brewing Company case, 104 Tenn., 725.

This proposition fully meets the eighth error assigned by defendant, and its insistence in *this case* that a foreign corporation cannot be proceeded against by a bill in equity until "it shall have been put to answer the charge by indictment or presentment and convicted thereunder by a jury."

This question and every phrase of it discussed by learned counsel for defendant, was settled against its contention here made, by this court in the Schlitz Brewing Co. case, *supra*. Moreover, in
674 Standard Oil Co. v. State, 117 Tenn., 618, procedure by bill in equity was pointed out as the proper method of enforcing the provisions in question, which are:

Every foreign corporation which shall violate any of the provisions of this act is hereby denied the right to do and is prohibited from doing business in this State. It is made the duty of the Attorney General of this State to enforce these provisions by due process of law.

No doubt this court was not a little helped to its decision in the case of Standard Oil Co. v. State, 117 Tenn., 618, by the argument of learned counsel for the defendant in that case. A part of said argument is set out in this record. We quote therefrom:

No District Attorney General can proceed by indictment against a corporation under this act. The Attorney General of the State, if the case be one calling, in his judgment, for proceedings, may bring a bill in equity in the nature of a *quo warranto* proceeding, to oust that foreign corporation from doing business in Tennessee. That is what is to be done, and it is all that can be done. And, as already shown, even that cannot be done, if the corporation is engaged in interstate commerce business. That is to say, speaking precisely, the Standard Oil Company might be ousted from maintaining stations in Tennessee and selling oil therefrom, as it does now, but it could not be ousted from selling oil in original packages here, even by proceedings inaugurated by the Attorney General of the State. But whatever he may be able to do under this act, certain

it is that no District Attorney General can indict the company, and no court can fine it, as the court in this case assumed to do.

Rec., 277.

675 Practically the same contention here made was insisted upon in the Schlitz Brewing Co. case, which was a proceeding to oust said brewing company, a foreign corporation, from doing business in this State, under the same provision contained in the anti-trust act of 1897, as is found in the act of 1903, and invoked in this case.

Responding to the same contention made in the Schlitz Brewing Co. case this court, speaking through Mr. Justice Caldwell, among other things, said:

As has been seen, Section 3 of the act prescribes criminal punishment, and Section 5 prescribes, additionally, a pecuniary civil liability for all violations of any of its provisions. Section 2 lays still another penalty on all corporations doing the prohibited thing. It declares that any domestic corporation "which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall thereupon cease and determine," and that "every foreign corporation which shall violate any of the provisions of this act is hereby denied the right to do, and is prohibited from doing business in this State."

It is this penalty laid on the offending class of foreign corporations that the complainant in this cause seeks to enforce against the Schlitz Brewing Co., a foreign corporation.

Demurrants say that the action does not lie in the Chancery Court, and the Chancellor so ruled. That ruling is incorrect, for two good and sufficient reasons. In the first place, the statutory declaration,

676 that the offending foreign corporation "is prohibited from doing business in this State," carries the implication that this penalty *may be enforced by prohibitory injunction, which is a process peculiar to the court of equity*; and in the second place, Chapter 97 of the Acts of 1877 (Shannon's Code, Sec. 6109) gives the Chancery Court concurrent jurisdiction with the Circuit Court in all civil causes of action, except those for injuries to the person, to property or character, involving unliquidated damages and in so doing it expressly makes this cause of action, which is not of the excepted class, cognizable in the Chancery Court.

Section 2 concludes with the sentence, "It is hereby made the duty of the Attorney General of this State to enforce the (these?) provisions by due process of law." As here employed, the phrase "by due process of law" is the equivalent of the other phrase "in any court of competent jurisdiction," appearing in other statutes, and it does not otherwise indicate any particular tribunal. Its meaning here is wholly different from the meaning of the same phrase as used in the Federal Constitution and in several of the State Constitutions, where it has the same significance as have the words "by the law of the land," appearing in the Tennessee Constitution and in Magna Charta. The present bill is a proceeding by due process of law within the meaning of this statute.

The third assignment of demurrer, which also goes to the jurisdiction of the court, is that "the said bill is preferred under the provisions of the said act of the General Assembly of Tennessee of 1897 to enjoin the Schlitz Brewing Co., as a foreign corporation, from doing business in the State of Tennessee, upon allegations that it has violated the provisions of said act, without alleging or attempting to show that any proceeding has been instituted at law which resulted in the conviction of the said corporation in 677 that behalf, and without such antecedent proceedings a court of chancery has no jurisdiction to enjoin said corporation from engaging in or doing business in the State of Tennessee."

It is in no sense essential to the complainant's right to maintain this action, that there should have been an antecedent conviction in a court of law. The penalty whose enforcement is here sought is *apart from and independent of a criminal conviction*. It is prescribed in a different section of the act, is expressed in unconditional terms, and is entirely without dependent connection with either the *criminal responsibility* or the pecuniary liability prescribed separately in the other two sections respectively. Any court having jurisdiction to enforce any penalty or *remedy provided for in the act was obviously intended to have, and manifestly has, jurisdiction also to first adjudge the fact of violation on which the enforcement must ultimately find its support and justification.*

Schlitz Brewing Co. case, 104 Tenn., 748-751.

This method of procedure by bill in equity against a corporation offending against the laws of this State was provided for more than fifty years ago. Formerly, and at common law, corporations were proceeded against for violating the powers conferred upon them by *quo warranto* or an information in the nature of a *quo warranto*. However, it was held at an early date in this State that neither the writ of *quo warranto* nor information in the nature thereof was ever in force in this State.

State v. McConnell, 3 Lea, 335;

State, *ex rel. v. Turk*, M. & Y., 286.

678 The substitute for this ancient writ of *quo warranto* is provided by the Code (Shannon, Secs. 5165-5181). These provisions are to the effect that an *action lies in the name of the State* against a corporation, which, among other things, does or omits acts amounting to a forfeiture of its rights or the privilege conferred upon it, and that such action (Sec. 5167) shall be "*brought by bill in equity filed either in the Chancery or Circuit Court of the county*" wherein the corporation has a place of business. This proceeding is to be carried on according to the practice of courts of equity, but special provision (Sec. 5172) is made for the trial of issues of fact by a jury.

The suit or action or proceeding against a domestic corporation to forfeit its charter, or against a foreign corporation to cancel its license or permit to do business in a State, whether called "*quo warranto*" or "*information in the nature thereof*," or "*bill in equity*," is a *civil* remedy, and such action or suits in the name of the State

upon the relation of the Attorney General have too long been enforced to be now questioned.

2 Spelling Extraordinary Relief, Sec. 710.

High Ex. Leg. Rem., Sec. 710;

State v. Commercial Bank, 10 Ohio, 535;

State v. Kupferle, 44 Mo., 154;

State, *ex rel.* Attorney General v. Fireman's Fund Ins. Co., 152 Mo., 1;

Ames v. Kansas, 111 U. S., 449;

Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App.

State v. Standard Oil Co., 61 Neb. 28.

679 We ask Your Honors' attention to the opinion of the Texas Court of Appeals in *Waters-Pierce Oil Co. v. State*, *supra*. This was one of the pioneer cases under the Texas anti-trust act, containing many provisions similar to the Tennessee act. It was a proceeding instituted by the State of Texas by a petition setting out the facts against the Waters-Pierce Oil Co. seeking a cancellation of its license or permit to do business in Texas. Nearly every question insisted upon by defendant in this case is discussed in the Waters-Pierce Oil Co. case, and settled against defendant's contention herein. Among other things it was expressly held in that case that an *action to forfeit the permit of a corporation to do business in a State is a civil controversy*, and the charge need not be proven beyond a reasonable doubt.

This case went to the Supreme Court of the United States, and was there affirmed. (*Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28.) In affirming the holding and decision of the Court of Appeals of Texas, the Supreme Court of the United States, among other things (p. 43), said:

It is said that the statutes of Texas limit its right to make contracts and take away the property or liberty assured by the Fourteenth Amendment of the Constitution of the United States. Besides, it is asserted that the statutes make many discriminations, between persons and classes of persons, and able arguments are built upon their alleged injustice and oppression. We are not called

680 upon to answer those arguments or to condemn or vindicate the statutes on this record. The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has often been declared by this court. A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.

And further, after citing abundant authorities therefor, it was held

by the Supreme Court of the United States that the decision of the Texas court in no way violated any of the rights of the Waters-Pierce Oil Company under the Federal Constitution.

In *Northern Securities Co. v. United States*, 193 U. S., 197, which was a bill in equity brought by the United States to enjoin the Northern Securities Company from engaging in interstate commerce in violation of the federal anti-trust act, it was, among other things, held that, although cases should not be brought when a statute contained criminal provisions that are not clearly embraced by
681 it, the court should not, by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions, and while the act of July 2, 1890, contains criminal provisions, the Federal Court has power, under Section 4 of the act, *by a suit in equity*, to prevent and restrain violations of the act, and may mold its decree so as to accomplish practical results such as law and justice demand. Indeed, in this case, it was, in effect, held that a proceeding by bill in equity is the only practical and effective remedy to reach the evil sought to be prohibited in such cases.

V.

Further, it is again insisted by defendant (Brief, 116) that the transactions set out in the bill and upon which relief is sought are "transactions of interstate commerce, and (if they be unlawful) are violations of the act of Congress and not of the State of Tennessee; and that for that reason the State court has no jurisdiction to proceed against defendant in the present case."

In reply we submit—

The anti-trust act of 1903 has been by this court duly adjudged a valid and constitutional statute duly enacted under the police power of the State for the purpose of regulating intrastate trade, and that it does not affect or relate to interstate commerce.

682 This statute has been declared valid and constitutional by this court in—

Bailey v. Master Plumbers, 103 Tenn., 99;
State, ex rel. v. Schlitz Brewing Co., 104 Tenn., 715;
State v. Witherspoon, 115 Tenn., 138;
Standard Oil Co. v. State, 117 Tenn., 618.

In *Standard Oil Co. v. State*, *supra*, to which this same defendant was a party, making the same contention made here, this court, upon the point under consideration, in substance held:

First. That the anti-trust act of 1903 is not violative of the Constitution of the United States (Art. 1, Sec. 8) because it was not intended to apply to interstate commerce.

Second. That a statute regulating intrastate trade or commerce will be sustained and enforced so far as it relates to such commerce, though it may contain clauses invalid as attempting to regulate interstate commerce.

Third. An arrangement or combination affecting intrastate commerce is none the less a violation of the anti-trust act of 1903 and

punishable under it, because the arrangement or combination made incidentally affects interstate commerce, as where defendant corporation, for the purpose of protecting its own coal oil stored within this State for competition, agreed to give, and did give, to another a quantity of oil on his countermanding an order given a competitor for oil to be shipped from another State.

The authorities cited in the opinion of Mr. Justice Shields in *Standard Oil Co. v. State*, 117 Tenn., 618, abundantly sustain the conclusions and decision of the court in that case, and it is not deemed necessary to further enlarge this brief by restating them.

VI.

It is next insisted that the act of 1903 is unconstitutional in that, as claimed, (1) "it denies to the defendant the equal protection of the laws," and (2) "it deprives it of its property without due process of law."

This same assault has been twice made upon this act and as often repelled by this court: *Schlitz Brewing Co. case*, 104 Tenn., 715, 745-747, 753, and *Standard Oil Co. v. State*, 117 Tenn., 618, 676.

It is only necessary to bear in mind that the defendant is a foreign corporation, permitted to do business in Tennessee only by comity—that such permission may be accorded upon any condition imposed by the State or it may be refused entirely, or when given it may be revoked. The act in question is a valid exercise of the police power, and for its violation the statute has declared that a foreign corporation shall be denied the right to further exercise its powers under the protection of the State; that such permission is withdrawn, and this suit, to which defendant was made a party and in which it has had an opportunity to be heard and make all proper defense, accords it not only equal but such protection as it is entitled to under the law.

It seems to be complained that there is a difference between its exclusion from the State and the punishment which may be imposed upon one of its agents under Section 3 of the act—that is, a penitentiary sentence. Doubtless defendant would have been better pleased and thought the punishment nearer equal if a capital sentence had been imposed upon an agent by Section 3 of said act.

Further, the withdrawal of the State's consent does not deprive the defendant, as hereinbefore shown, of any right to which it is entitled or of its property. Its right to do business in this State depends solely upon the will of the sovereign, and it has no *property* interest or right in the license or permission extended to it by the State. Such license or permission is subject to the State's right to revoke or withdraw it.

These propositions made upon behalf of the State are fully sustained by the great weight of the adjudged cases, in many of which the precise contentions here made on behalf of the defendant have been repelled by the courts of last resort, both State and Federal, construing the provisions of different anti-

trust acts similar to our own—many of them containing provisions much more stringent than the act of 1903.

We cite some of them:

Texas *v.* Laredo Ice Co., 96 Tex., 461;
 Attorney General *v.* Buckeye Pipe Line Co., 61 Ohio St., 520;
 Ohio *v.* Pearly Gage, 72 Ohio St., 210;
 State *v.* Smiley, 65 Kan., 240;
 Kansas *v.* Smiley, 196 U. S., 447;
 Waters-Pierce Oil Co. *v.* Texas, 19 Tex. Civ. App., 1;
 Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 28;
 National Oil Co. *v.* Texas, 197 U. S., 115-127.

In Conclusion.

The defendant, in conclusion, attacks the policy of the act. Naturally, it, having enjoyed and abused the courtesy and hospitality of the State, questions the propriety of excluding it so that it may not continue to use and abuse that hospitality for its own pecuniary ends. However, with the policy of legislation, courts have nothing to do.

Schlitz Brewing Co. case, 104 Tenn., 740, 741.
 Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 43.

686 There is no doubt but that, with defendant's tremendous powers, as developed in this record, it may be an agency for good—it is oftentimes an agency for evil to others, and to those whom it should serve with just and fair trade.

And in conclusion, we cannot do better than to call the attention of this court to the case of State *v.* Armour Packing Co., 73 N. W., 653, wherein, among other things, it was said:

Competition is the life of trade. Pools, trusts, agreements and conspiracies to fix or maintain the price of a necessity of life strike at the foundations of government; instill a destructive poison into the life of a body politic; wither the energies of competitors; blight individual investments in legitimate business; drive small and honest dealers out of business for themselves and make them mere hewers of wood and drawers of water for the trusts; raise the cost of living and lower the price of wages. * * * The people are helpless to protect themselves. The powers that be must protect them or, as surely as history records the story of republican government at Rome, so surely will the foundations of our government be shaken and its perpetuation be threatened.

Defendant, through its counsel, sees fit to criticise this attempt to enforce the law of the State in pursuance of its declared policy as frivolous. The acts and doings of defendant at Gallatin did not seem frivolous to those affected thereby, nor were such acts
 687 and doings foreign to its "general policy." It sought to do the same thing in Stewart County through its agent Reynolds. When competition, open, honest and fair, stood in the way of its absolute control of the Nashville market, it did not hesitate in its own peculiar way to either drive out or buy out one of its competitors and

to make of the other its creature, continuing to hold it out as a competitor while it was serving only defendant's interests.

It is said by learned counsel that his record discloses no more than one violation of the act by defendant, even if it be conceded that its acts and doings at Gallatin violated the act.

Is it meant by this that a law should not be enforced for one violation? How often must a statute be broken before the punishment provided by it shall be visited upon the offender?

But we say to Your Honors that while this record touches the business of the defendant at only three places—at Gallatin, at Dover and in Nashville—and yet in each and all of these places this record does show that the defendant, whenever it had the opportunity, did not hesitate to stifle competition or, by means denounced by the statute, to drive a competitor out of the market.

688 That the act has been violated by the defendant is demonstrated. The State now asks that the penalty be enforced.

Respectfully submitted,

CHARLES T. CATES, JR.,
Attorney General.

W. A. GUILD,
R. L. PECK,
of Counsel.

689 Filed April 11, 1908. Joe J. Roach, Clerk.

Nashville, December Term, 1907.

STATE OF TENNESSEE *ex Rel* CHARLES T. CATES, JR., Att'y Gen.,
vs.
STANDARD OIL COMPANY.

Opinion.

The bill in this case was filed for the purpose of ousting the defendant from the State, and to obtain a perpetual injunction against its doing business in the State.

There was a demurrer filed, which was overruled, and then an answer was filed by the defendant and proof heard. The result was, a decree was pronounced by the Chancellor, in accordance with the prayer of the bill, qualified, however, by a clause that nothing in the decree should be construed to in any way affect or apply to defendant's interstate commerce or to prohibit it from engaging in interstate commerce within this State.

There was a supplemental bill filed which was demurred to by the defendant, and the demurrer sustained.

From the decree sustaining the original bill, and granting relief thereon, the defendant appealed to this Court, and has here assigned errors, and from the decree sustaining the demurrer to the supplemental bill the State has appealed to this Court and assigned errors.

In the view which we take of this case we need not further ad-

vert to the supplemental bill, or the action of the Chancellor thereon.

690 Inasmuch as some of the defenses interposed, both of law and fact, depend upon criticisms made upon the language and scope of the bill, it is proper that that pleading be set out substantially in full.

Omitting the caption it reads as follows:

"Complainants respectfully show unto your Honor:

"That the defendant, Standard Oil Company, is a corporation originally chartered and organized under the laws of the State of Kentucky, and since 1893 has been claiming the right to do, and has been doing business in the State of Tennessee, after having filed a copy of its charter in the office of the Secretary of State of complainant, State of Tennessee, on September 21, 1893; a duly certified copy thereof is herewith filed as Exhibit "A" to this bill, but need not be copied in issuing process. Said defendant was, at the time of the matters hereinafter shown, and still is, doing business in Sumner County, Tennessee, and has a local agent residing at, in or near the town of Gallatin, in said Sumner County.

"Complainant further shows and avers that in 1903 the defendant, Standard Oil Company (for convenience hereinafter referred to as defendant company), was engaged in and carrying on the business in Sumner County, and in Tennessee generally, of a dealer in coal oil and other products of petroleum, which were and are commonly used for illuminating and other purposes, which it sold both to retail dealers and the public generally. The business of defendant company in the greater part of Tennessee, including Sumner County, was under the management and control of one J. E. Comer, whose headquarters or offices were at Nashville, in Davidson County, Tennessee, and the local agent having in charge the business of said company at or near Gallatin, Tennessee, was one O'Donnell

691 Rutherford, and there was also employed in and about the business of defendant company one C. E. Holt, who was styled a *slavesman*, but who had charge, under the general supervision of said Comer, of the local agents and agencies of said company, inspecting the same and giving directions and instructions thereto. The said Comer, as special or managing agent, and the said Holt, acting under him, were authorized by defendant company to do, and, in fact, did, whatever, in their judgment, was necessary to advance the interests of their employer.

"Complainant further shows that the oil for illuminating and other purposes handled, sold and dealt in within the State of Tennessee, was imported and brought into said State from other States, and then stored in large iron tanks located at places where defendant company established local agencies, and from said tanks, usually called storage tanks, said oils were offered for sale and sold to retail dealers, and oftentimes to the public generally. Defendant company had one of its storage tanks located at Gallatin, and from this tank it supplied the demand for oil in Gallatin and at other places in Sumner County.

"Complainant further shows and avers that prior to October, 1903,

defendant company had succeeded in preempting and securing for itself the oil business in Sumner County, and had succeeded in preventing other dealers in coming in competition with its said business in Sumner County, and at said time, to-wit: In October, 1903, was engaged in selling in Sumner County an inferior grade of oil at the price of 13½ cents per gallon.

692 "Complainant further shows that thus matters stood in relation to the oil business carried on by defendant company at Gallatin, when, on or about October 5, 1903, one Claude Rosemon, as agent or traveling salesman of the Evansville Oil Company, whose chief office was at Evansville, in the State of Indiana, and which was engaged in the business of selling, among other things, illuminating oils, went to Gallatin, in Sumner County, Tennessee, and offered for sale to certain retail dealers at that place a superior grade of oil in competition with the oil of defendant company then stored in its tanks at Gallatin, or which was being offered for sale at that place, and the said Rosemon succeeded in securing from certain customers of defendant company orders for about sixty barrels of oil at the price of 14½ cents per gallon, to be shipped from Oil City, Pennsylvania, and delivered in original packages to said persons giving said orders about November 1, 1903. Among others, said Rosemon secured an order from one S. W. Love for ten barrels of oil; from one W. H. Lane an order for five barrels of oil; from one J. E. Cron an order for ten barrels of oil; and from one L. C. Hunter an order for six barrels of oil.

"Thereupon, information having come to defendant company that said Evansville Oil Company had secured orders for it, from, and sold oil to, its customers at Gallatin, as hereinbefore shown, and was thereby and in that manner competing with the oil business of defendant company at Gallatin, the said defendant company and its said agents, J. E. Comer, C. E. Holt, and O'Donnell Rutherford and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, unlawfully made and entered into an arrangement, agreement and combination, with a view to lessen, and which tended to lessen, full and free competition in the sale of defendant company's oil then being sold or offered for sale at Gallatin, and the said defendant company and its said agents, Comer, Holt and Rutherford, and the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter, and perhaps others unknown to complainant, entered into and made certain unlawful arrangements, 693 agreements or combinations which were designed to advance, and which tended to advance, the price or cost to the purchaser or consumer of defendant company's said oil then being sold or offered for sale at Gallatin as aforesaid.

"And complainant further shows unto your Honor that, in order to carry said unlawful arrangements, agreements or combinations into effect, and as a part of such unlawful agreements, arrangements or combinations, the said defendant company and its said agent, C. E. Holt, induced the said S. W. Love, W. H. Lane, J. E. Cron and L. C. Hunter to rescind and cancel their several purchases of oil or orders for oil from said Evansville Oil Company, and as a

consideration or inducement for said rescissions or cancellations, and as a part of said unlawful arrangements, agreements or combinations, said defendant company gave without cost or charge to the said S. W. Love one hundred gallons of oil, and to the said W. H. Lane fifty gallons of oil, to the said J. E. Cron one hundred gallons of oil, and to the said L. C. Hunter fifty gallons of oil, and, at its own expense, sent telegrams, in the name of said Love, Lane, Cron and Hunter, to said Evansville Oil Company, cancelling the orders of said parties.

"Complainant further shows unto your Honor that the said Love and others named above not only rescinded and cancelled, in the manner, and as above shown, their several orders given to the Evansville Oil Company as aforesaid, but that they refused to accept or receive said oil when the same was shipped to Gallatin. So that the said Evansville Oil Company was driven from the field as a competitor with defendant company in the oil business at Gallatin, and thereupon defendant company, having succeeded by means of and through the aforesaid unlawful agreements, arrangements and combinations, in not only lessening, but destroying, full and free
694 competition in the sale of its oil then stored at Gallatin and being offered for sale, immediately advanced the price of its oil, which was of inferior grade, as hereinbefore shown, from 13½ cents per gallon to 14½ cents per gallon, the price at which the said Evansville Oil Company had offered for sale and had sold a grade of oil far superior, as complainant is informed and believes, to the oil sold by defendant company.

"So that complainant avers and charges that the unlawful arrangements, agreements or combinations made and entered into between the defendant company and its said agents, Comer, Holt and Ruthersford, and the said Love, Lane, Cron, and Hunter, as hereinbefore shown, were not only made with a view of lessening full and free competition in the sale of defendant's oil at Gallatin, but that in fact said unlawful arrangements, agreements or combinations naturally tended to and did result in lessening and destroying full and free competition in defendant company's said oil at Gallatin, and naturally tended to and did result in advancing the price or cost of said oil to defendant's customers and the consumers of said oil in and about Gallatin and in Sumner County, Tennessee.

"Therefore, complainant charges that defendant company, a foreign corporation as aforesaid, has, in the manner hereinbefore set out, violated the provisions of section 1 of chapter 140, of the Acts of the General Assembly of 1903, and this bill is brought by the complainant, through her Attorney General as aforesaid, in order that the punishment of such violations prescribed by section 2 of said Act may be imposed upon said defendant company, to-wit, that said defendant company be denied the right to do, and be prohibited from doing, business in this State.

"The premises considered, complainant prays:

First. That the said Standard Oil Company may be made a party
695 defendant to this cause, according to the practice of this Honorable Court—that is, by due service of subpoena, and that it may be required to answer the allegations of this bill fully

and truly, but its answer under oath, or the equivalent of an oath, is hereby expressly waived.

"Second. For a decree enforcing the provisions of chapter 140 of the Acts of 1903, and particularly section 2 of said Act, against said defendant company, to the end that it be denied the right to do, and be prohibited and ousted from doing, business within this State, and to the end that such decree may be made effectual, its permit or license to do business in this State be cancelled; that the said defendant company, its officers, agents, employes, and all persons acting for it, may be perpetually enjoined from doing or carrying on its business in this State.

"Third. For all such interlocutory orders and decrees as may from time to time become necessary in the progress of this cause, in order to attain the ultimate relief hereinbefore prayed, including, if it shall be necessary, an order restraining *pendente lite* the defendant company from carrying on and doing business in this State.

"Fourth. And if in any way complainant is mistaken in its special prayers, it prays for all such other further and general relief as in equity it may be entitled to.

"Fifth. This is the first application for an injunction or extraordinary process in this cause."

The demurrer filed to the bill stated the grounds of objection thereto as follows:

"First. That the said bill nowhere states the terms or provisions of the agreement, arrangement or combination alleged to have been entered into and made as the law requires to be done in order to oblige this defendant to answer.

"Second. The bill fails to show an arrangement, agreement or combination in violation of any act or law of the State of Tennessee, and not an act, if a violation of law at all, in violation of the laws of the United States relating to interstate commerce."

On this demurrer being overruled, the defendant answered the bill, and in this answer, after admitting its incorporation and organization, as stated in the bill, and that it was doing business in Sumner County, and denying that it had done the things complained of in the bill, then proceeded to set up a variety of defenses, all of which are so fully stated in the assignments of error that they need not be referred to more specifically at this point.

The statute on which the controversy is based, omitting the caption, reads as follows:

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same. That from and after the passage of this Act all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles or domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price or the

cost to the producer or the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void.

"SECTION 2. Be it further enacted, That any corporation chartered under the laws of the State which shall violate any of the provisions of this Act shall thereby forfeit its charter and its franchise and its corporate existence shall thereupon cease and determine. Every foreign corporation which shall violate any of the provisions of this Act is hereby denied the right to do, and is prohibited from doing business in this State. It is hereby made the
697 duty of the Attorney General of this State to enforce these provisions by due process of law.

"SECTION 3. Be it further enacted, That any violation of the provisions of this Act shall be deemed, and is hereby declared to be destructive of full and free competition and a conspiracy against trade, and any person or persons who may engage in any such conspiracy or who shall, as principal manager, director or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders made in furtherance of such conspiracy, shall upon conviction be punished by a fine of not less than one hundred dollars or more than five thousand dollars, and by imprisonment in the penitentiary not less than one year nor more than ten years; or in the judgment of the court, by either such fine or imprisonment.

"SECTION 4. Be it further enacted, That any person or persons or corporation that may be injured or damaged by any such arrangement, contract, agreement, trust or combination, described in Section 1 of this Act, may sue for and recover in any Court of competent jurisdiction in this State of any person or persons or corporation operating such trusts or combination, the full consideration or sum paid by him or them of any goods, wares, merchandise or articles, the sale of which is controlled by such combination or trust.

"SECTION 5. Be it further enacted, That it shall be the duty of the Judge of the Circuit and Criminal Courts of this State specially to instruct grand juries as to the provisions of this Act.

"SECTION 6. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

"SECTION 7. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.
698 "Passed March 16, 1903."

There are twenty errors assigned. We shall not set them out at this point, but shall state them as they are severally disposed of, and shall dispose of them not in the order in which they are set forth in the brief, but in what shall seem to us the most convenient order.

We shall first take up the demurrer.

The first ground is in substance that the bill does not state the terms of the agreement, arrangement or combination alleged to have been entered into.

The terms of the agreement, arrangement or combination, while not stated with precision in the bill, appear therein with sufficient

fullness and accuracy to justify the requirement of an answer on the part of the defendant.

It appears from the bill that the defendant was, at the time of the matters complained of, doing business in Sumner County, this State, and engaged in the sale of oil; that this business was under the management of one J. E. Comer, whose headquarters were at Nashville, Davidson County; that the local agent in charge at Gallatin was O'Donnell Rutherford, and that one Holt, who was styled a salesman, had charge under the general supervision of said Comer of the local agents and agencies of the defendant, inspecting them and giving directions and instructions to them; that Comer, and Holt acting under him, were authorized by the defendant to do, and in fact did, whatever in their judgment was necessary to advance the interests of their employer; that the oil which the defendant dealt in was imported into the State from other states and then stored in large iron tanks at places where the defendant established local agencies, and from these tanks, usually called storage tanks, oils were offered for sale, and were sold to retail dealers, and oftentimes to the public generally. One of the storage tanks was located at Gallatin, and from this tank the defendant supplied the oil at
699 Gallatin and at other places in Sumner County; that prior to October, 1903, the defendant had practically secured a monopoly of the sales of oil in Sumner County, and on the date mentioned, was engaged in selling oil there of inferior grade, at the price of 13½ cents per gallon.

After having thus outlined the situation of affairs, at the date when the occurrence happened which is the subject of the complaint contained in the bill, it then set forth the occasion of entering into the "agreement, arrangement or combination" complained of. This was that about October 5th, one Claude Rosemon, an agent or traveling salesman of the Evansville Oil Company, whose chief office was at Evansville, in the State of Indiana, and which was engaged in the business of selling oil, went to Gallatin in Sumner County, and offered for sale to certain retail dealers, a superior grade of oil in competition with the oil of the defendant company then stored in its tanks at Gallatin, or which was being offered for sale at that place, and that Rosemon succeeded in securing from certain customers of the defendant company orders for about sixty barrels of oil at the price of 14½ cents per gallon to be shipped from Oil City, Pennsylvania, and delivered in original packages to said persons, about November 1st, 1903; that among others, Rosemon secured an order from S. W. Love for ten barrels, another order from W. K. Lane for five barrels and still another from J. E. Cron for ten barrels, and another from L. C. Hunter, for six barrels.

It is alleged that information having come to defendant company that the Evansville Oil Company had secured these orders from its customers at Gallatin and was thereby competing with the defendant's oil business, the defendant and its agents Comer, Holt, O'Donnell Rutherford and the said purchasers from the Evansville Oil

Company entered into the "agreement, arrangement or combination" complained of. It is stated that as a part of the
700 agreement, arrangement or combination the defendant com-

pany and its agent Holt induced the purchasers named to rescind and cancel their several purchases of oil, or orders, from the Evansville Company. It is also stated that as a consideration or inducement for said rescissions or cancellations, and as a part of the unlawful arrangements, agreements or combinations that the defendant company gave, without cost or charge, to S. W. Love one hundred gallons of oil, to W. H. Lane fifty gallons, to J. E. Cron one hundred gallons, and to L. C. Hunter fifty gallons of oil, and at its own expense sent telegrams to the parties named to the Evansville Oil Company cancelling the orders of the parties.

In the paragraph of the bill immediately preceding what we have just stated, the arrangement, agreement or combination described in respect of its purpose or tendency as being "with a view to lessen, and tending to lessen, full and free competition in the sale of defendant company's oil, then being sold or offered for sale, at Gallatin", and further on in the same paragraph it is described as "designed to advance, and tending to advance the price or cost to the purchaser or consumer of defendant company's oil, then being sold or offered for sale at Gallatin."

In a subsequent paragraph it is stated that the purchasers named, that is Love and others, actually rescinded and cancelled the orders above mentioned, and refused to accept the oil when it was shipped to Gallatin; that thereby the Evansville Oil Company was driven from the field as a competitor, "and thereupon defendant company, having succeeded by means of and through the aforesaid unlawful agreements, arrangements and combinations, in not only lessening, but destroying, full and free competition in the sale of its oil then

701 stored at Gallatin and being offered for sale, immediately advanced the price of its oil, which was an inferior grade, as hereinbefore shown from 13½ cents per gallon to 14½ cents per gallon, the price at which the said Evansville Oil Company had offered for sale, and had sold a grade of oil far superior; * * * that the unlawful arrangements, agreements and combinations * * * were not only made with a view of lessening full and free competition in the sale of defendant's oil at Gallatin but that in fact said unlawful arrangements, agreements or combinations naturally tended to and did result in advancing the price or cost of said oil to defendant's customers, and the consumers of said oil in and about Gallatin, and in Summer County, Tennessee."

We do not think there is much difficulty in ascertaining from these allegations that the defendant and its agents Comer and Holt had entered into an agreement to procure the cancellation of the orders previously obtained by the Evansville Oil Company, with a view to lessening full and free competition in the sale of the defendant's oil, then being sold or offered for sale, at Gallatin, and that this agreement, arrangement or combination tended to lessen such full and free competition; also that it was designed to advance and tended to advance the price to the purchaser or consumer of defendant's oil; that the purchasers from the Evansville Oil Company were induced to enter into this arrangement, and did enter into it by reason of the gift of certain barrels of oil to them respectively,

and that the effect of the transaction was to enable the defendant to retain its monopoly of the sale of oil, and to keep and use the power to advance the price.

In Gibson's Suits in Chancery, section 63, it is said: "The Court makes every reasonable presumption in favor of bills, when assailed by a demurrer or motion to dismiss." Citing Code, section 702 2884 (Shan. 4605): *Thompson vs. Paul*, 8 Humph., 117;

Lincoln vs. Purcell, 2 Head, 143; *Hobbs vs. Memphis & Charleston R. R. Co.*, 9 Heisk., 879, same case, 12 Heisk., 531; *French vs. Dickey*, 3 Tenn., Chan., 302. The same author in section 317 says: "The Courts make every reasonable presumption in favor of the bill when assailed by a demurrer; and if upon a critical examination of the facts stated in the bill there is a possibility that the suit may be sustained, though upon a different ground from that assumed, a demurrer to the whole bill will be overruled, the policy of the Courts being to give every complainant an opportunity to be heard on the merits of his case, when any equity whatever appears in his bill, although defectively stated." * * * Citing in support of the text the authorities already referred to, and in addition thereto *Kerr vs. Kerr*, 3 Lea, 224; *Trafford vs. Wilkinson*, 3 Tenn. Ch., 449; *Anderson vs. Mullenix*, 5 Lea, 287. The authorities cited fully sustain the text as the rule obtaining in this State, although it is conceded in these authorities that a different rule applies in the English Chancery practice.

It appears from the answer that the defendant had no difficulty in placing a similar construction upon the bill.

In paragraph 4 of the answer it is said:

"Respondent believes it to be true, and therefore admits, that its special agent, Mr. Comer, at Nashville, was informed in some way of the fact that Mr. Rosemon had visited Gallatin for the purpose of taking orders or making sales; but he did not know the success of Mr. Rosemon's visit—that is, whether he had placed any orders or not.

"C. E. Holt was a traveling salesman in the service of this company's Nashville agency, and about the 8th or 10th of October, 1903,

703 Mr. Holt, who was then at Monterey, Tennessee, traveling for the company, was informed by Mr. Comer of the fact that said Rosemon had visited Gallatin; and he directed Mr. Holt to go to Gallatin and ascertain what had been done, for the purpose of looking after his trade; for the trade of Gallatin had been one of value to respondent, and it had put itself to great expense in establishing the station, wagons, &c., to accommodate that trade. Mr. Comer did not authorize, or direct, or order, Mr. Holt to proceed to Gallatin and effect a countermand of the orders which the Gallatin merchants had given to Mr. Rosemon by gifts of oil, as charged in the bill; neither had any agent of the company authorized or directed him so to do. Respondent says that it had not been conducting business in that way in the State of Tennessee, and that it had never done anything of the kind, or had its agent, Mr. Comer, ever directed anything of the kind in any part of Tennessee.

"Mr. Holt was a traveling salesman with authority to look after

the local agents; that is to say; see what they were doing, and to report; but he had no authority whatsoever to fix the price of oil, nor to sell it at any other price than that at which he was directed to sell it through the special agent, nor to give away oil, nor to control the local agents in any way.

"On or about the 12th day of October, 1902, Mr. Holt arrived at Gallatin, and upon inquiry ascertained that Mr. Rosemon, on his said visit to Gallatin, had taken orders from merchants of that place who were his regular customers, for the purchase and delivery of coal oil in barrels. He was informed that merchant S. W. Love had ordered ten barrels, merchant W. H. Lane had ordered five barrels, merchant J. E. Cron had ordered ten barrels, and merchant L. C. Hunter had ordered five barrels.

"Respondent was not then, but is now informed and believes it to be true, that Mr. Holt approached these merchants to induce them to countermand the orders they had given to Mr. 704 Rosemon, and to that end explained to them how they had been his customers; that the oil of this respondent was as good as Mr. Rosemon's; that it was of great advantage to them to buy from this respondent by reason of the fact that they could buy in any quantity (over twenty gallons) and have it delivered from the wagons, at their doors, and would not be obliged to keep it in wooden barrels and suffer leakage and loss—as would be in the case of the oil ordered from Mr. Rosemon; respondent admits that Mr. Holt endeavored, by arguments of this kind, to induce them to countermand the orders which they had given. Respondent is now, but was not then, informed, and believes it to be true, that not having succeeded with these arguments, he, and the local agent, O'Donnell Rutherford, as an inducement, also offered and agreed to give them oil; that is to say, to give to Mr. Love and Mr. Cron (who had ordered ten barrels each) 100 gallons of oil each, and to Mr. Hunter and Mr. Lane (who had ordered five barrels each) 50 gallons each, if they would countermand the said orders; and it admits that thereupon these merchants accepted these offers, and agreed to countermand them, and that they thereupon did telegraph immediately to the Evansville Oil Company, at Evansville, Indiana, countermanding their orders. Said S. W. Love telegraphed as follows:

'Kindly countermand my order for ten barrels of oil.

'S. W. LOVE.'

"The other countermanding orders were similar to this.

"The fact that the said four orders had been procured to be countermanded by gifts of oil was concealed from this respondent company, and from its special agent, Mr. Comer, and was known only to the said Holt and the said Rutherford, mere subordinate employees, without authority to make contracts for the company 705 of any other kind than sales of oil at the prices fixed by or through the special agent, at Nashville. The first knowledge that the respondent company had thereof, came to its special agent, Mr. J. E. Comer, at Nashville, about the 23rd day of December, 1903,

from said Rutherford, and immediately he disapproved of the transaction, reprimanded said Rutherford and Holt, and deducted \$40.50, the value of said oil, from the monthly salary of Mr. Rutherford, the local agent, who had delivered the three hundred gallons of oil to the said merchants, and in this way made him refund to the company, and pay for the same. The managing officers of this company had no knowledge of these transactions until informed thereof by said Comer; and he had no knowledge thereof until Dec. 23rd, 1903.

"Respondent has now stated fully and in detail the transactions which are attempted to be made an illegal and criminal agreement, or combination, by the bill filed in this cause.

"Respondent says there is no other foundation for the charge made against it in this bill; that the facts are as stated above, and that these are all the facts in the case."

We think the bill states a cause of action. The same transaction was examined by the Court in what is known as Holt's case, reported in 117 Tenn., under the style of *Standard Oil Company vs. The State, Id.* 618.

We are referred to the case of *State vs. Witherspoon*, 115 Tenn., 140, as an authority in support of the demurrer. We think that an examination of that case will disclose that the analogy sought to be drawn between that case and the present does not hold. The indictment in that case was that Ross Witherspoon "did in Madison County, Tennessee, unlawfully, knowingly, and feloniously as president, director and agent of the Southern Seating & Cabinet Company * * * carry out the stipulations, purposes, prices, rates, and orders, made by the said Southern Seating & Cabinet Company with the American School Furniture Co., a foreign corporation, in furtherance of a conspiracy against trade, to-wit, the said Southern Seating & Cabinet Company and the said American School Furniture Co. having heretofore entered into, and being then and there parties to an arrangement, agreement, trust and combination, with a view to lessen, and which tended to, and did lessen, full and free competition in the importation and sale of articles imported into the State of Tennessee, and in the manufacture and sale of articles of domestic growth and of domestic raw material, and which tended to and did advance and control the price and cost of such product and article to the consumer and buyer thereof against the peace and dignity of the State."

The objection which the Court found to the indictment is thus stated in the opinion:

"It utterly fails to state the terms of the agreement, or arrangement entered into by the parties, and the particular articles imported or of domestic manufacture or growth, the price of which such arrangement, agreement and conspiracy tended to control and lessen or advance. The indictment would apply to imported articles as well as domestic articles, and to domestic manufactured articles equally with articles of raw material. It would apply equally to any one of the hundreds of articles of commerce which are imported into the State, or which are here manufactured or otherwise produced. It clearly, for these reasons, fails to give the defendant any

notice of the nature of the charge brought against him, or of the particular crime which he is accused, and is held to answer, so that he could with intelligence prepare his defense. Nor is the crime charged so identified that the record in this case could be relied upon

707 in another for the same offense upon the plea of former conviction or acquittal. The indictment should charge the particular article, whether imported or of domestic manufacture and growth, in relation to which the contract, arrangement, and agreement between the parties is made, and the effect of such arrangement upon the prices of such articles. Without a statement of these facts the defendant will be put to trial without presentment or indictment, and will be denied his constitutional right to know the nature and cause of the accusation against him."

Not to mention the difference between an indictment and a bill in chancery, it is clear that there is nothing in the foregoing on which we could hold that there was a fatal defect in the bill similar to the defect noted in the Witherspoon case.

The first ground of demurrer must therefore be overruled.

The second ground of demurrer presents the same subject which arises under the fourth, fifth and twelfth assignments of error, and will be passed for the present.

We shall next consider together the sixth, ninth, tenth and eleventh assignments of error, as they are rested substantially upon the same predicate; that is to say, that the agreement, arrangement, or combination which is the subject of the present litigation, if proven at all, was a crime, and should have been redressed by a criminal action.

The sixth assignment is that the Chancellor erred "in not holding and decreeing that the present proceedings put the defendant to answer a criminal charge without indictment or presentment, or without being based upon a conviction upon a previous indictment or presentment—in violation of the Constitution of Tennessee."

The ninth assignment is that the Chancellor erred "in not holding and decreeing that the bill be dismissed for that the said act
708 is unconstitutional and void, because: (a) it arbitrarily and capriciously denies to the defendant, a foreign corporation, the right to a trial by jury, for a violation of its provisions; (b) it arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions the right of trial by jury granted to natural persons, charged with violating its provisions; (c) it arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions, a trial according to the laws of the land for the trial of criminal charges whereby the defense of the statute of limitations can be pleaded and relied upon, while it grants the same to natural persons charged with violating its provisions; (d) it arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions a trial according to the procedure prescribed by the laws of the land for the trial of criminal charges, whereby the guilt of the party charged must be established beyond a reasonable doubt in order to convict, and obliges the corporation to answer and defend in a procedure

whereby it may be convicted upon a mere preponderance of the evidence, or upon less evidence than such as is required to establish guilt beyond a reasonable doubt, when it grants to natural persons charged with its violation, the right to be tried according to that procedure prescribed by the laws of the land under which the accused must be proven guilty beyond a reasonable doubt, in order to convict."

The tenth assignment is that "the said act is null and void for that it is in violation of the Constitution of the United States, particularly the fourteenth amendment, in that it deprives the defendant of its liberty and property without due process of law. It deprives of its liberty and property without the process of law in each and every of the respects mentioned and stated under error
709 No. 9 hereinbefore, marked *a, b, c*, and *d*, and in error No. 6; and which are here referred to, and made a part hereof, the same as if here repeated again; and the Court erred in not dismissing the bill accordingly."

The eleventh assignment is, "that the said act is null, and void, for that it is in violation of the Constitution, of the United States, particularly the fourteenth amendment, in that it deprives this defendant, a person within its jurisdiction, of the equal protection of the laws. It denies that equal protection in each and every of the respects mentioned and stated under error No. 9 hereinbefore marked *a, b, c* and *d*, and in error No. 6, and which are here referred to and made a part thereof the same as if here repeated again; and in not dismissing the bill accordingly."

In disposing of these assignments it is necessary that we should make a brief review of the methods pursued at common law in forfeiting the charters of corporations, and those pursued in this state.

In a note to *People vs. Rensselaer & R. Co.*, 30 Amer. Dec., 45, Mr. Freeman says:

"The writ of *quo warranto*, having its origin at some unascertained period, early in the history of the common law, was a high prerogative writ, in the nature of a writ of right for the king against one who usurped or claimed any office, franchise, or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right. It also issued in cases of the misuser or non-user of a franchise, commanding the respondent to show by what right—*quo warranto*,—he exercised the franchise, having never had any grant of it, or having forfeited it by neglect or abuse. (3 Bla. Com. 262-264; High on Extr. Rem., sec. 592.). If the respondent could not establish his right, the franchise or office, as it might be, was forfeited to the crown. As many of the charters under which the franchises were claimed had been destroyed in the numerous
710 insurrections under which the country suffered, or had been otherwise lost, sufficient authority for the exercise of the royal grants could not, in very many instances, be shown; and the crown became enriched at the expense of its subjects. The writ was especially calculated to subserve the purposes of a grasping monarch, as the right of the respondent to his office, liberty, or franchise was heard before commissioners of the king's own appointing. To cor-

rect the abuse of the royal prerogative, and to afford some opportunity for a fair and convenient hearing, the statutes of Gloucester, (6 Edw. I, 1278) and *de quo warranto novum*, (18 *Ibid.* 1290) were passed. These statutes secured the right of a trial before the justices on their circuits, and confirmed those franchises resting in prescription, or claimed under charters granted within the time of Richard I., or granted prior thereto, but since allowed.

In the same learned note Mr. Freeman thus notes the rise of the information in the nature of *quo warranto*:

"This writ was of a civil nature, forfeiting or annulling some franchise, or ousting the respondent from its exercise; and, being a writ of right, it was conclusive upon the crown. These features of the proceeding, together with the reason that, with the discontinuance of justices *in eyre*, (2 Coke Inst., 498) the statute 18 Edw. I. lost its efficacy, led to the introduction of the speedier remedy, and one not so binding upon the crown, of information in the nature of *quo warranto*. This remedy was criminal in its nature, and not only forfeited the usurped or misused franchise to the crown, but also punished the usurper. Like the original writ of *quo warranto*, the precise date of the appearance of this information is unknown. It grew up side by side with the older writ, and gradually supplanted it. It was a criminal proceeding, and warranted the imposition of a fine for the usurping of the king's liberties; but the fine fell to a

nominal amount, and the information existed merely as a
711 substitution for the original *quo warranto*. Thus far the contest in respect to a given franchise was carried on under the writ of *quo warranto*, or information in the nature thereof, between the crown and its subjects only. The province of the information was, however, greatly enlarged by the statute of 9 Anne, (Ch. 20, year 1711), which gave to private individuals the power of proceeding thereunder against anyone who had unlawfully usurped or intruded into any office or franchise. This act, one of vast importance, is preserved in substance in the majority of the States of the Union."

The statute referred to provided "that from and after the said first day of Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices, or franchises, it shall and may be lawful to and for the proper officer, in each of the said respective courts, with the leave of the Courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices, or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto*; and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several per-

sons, in order to try their respective rights to such offices or franchises; and such person or persons, against whom such information or informations in the nature of a *quo warranto* shall be sued or prosecuted, shall appear and plead as of the same term or
 712 sessions in which the said information or informations shall be filed, unless the Court where such information shall be filed shall give further time to such person or persons against whom such information shall be exhibited, to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of a *quo warranto*, shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in any wise notwithstanding."

Mr. Thompson, in his work on corporations, Volume 5, section 6770, says:

"The writ of *quo warranto* and the information in the nature of a *quo warranto* have been used against corporations, and against persons claiming corporate franchises from the earliest times. The ancient theory of the remedy was that a franchise is a portion of the royal prerogative, granted to the subject and existing in his hands, and that to misuse or usurp this delegated right is an infringement upon the rights of the sovereign; and accordingly, as elsewhere seen, the form of the judgment anciently was that the franchise be seized into the king's hands. In the United States the sovereign power resides in the State, the Commonwealth, or the people, according to various theories, and the information in such a case proceeds on the same theory. The theory is, that 'it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for a breach of trust'; and that, 'where there has been a misuser or a non-user in regard to matters which are of the essence of the contract between the corporation and the state, and the acts or omissions complained of have been repeated and willful, they constitute a just ground of forfeiture'."

713 In a note to *Buckman vs. The State of Florida*, in respect of jury trials, in this class of cases, it is said:

"The practice has been almost universal to submit the questions of fact arising in *quo warranto* proceedings to a jury as will be seen by the authorities cited in the above case and those collected in the case of *Reynolds vs. State*, 61 Ind., 392, but in cases in which the question of the right to such trial has been adjudicated are very few. There are many early English cases decided before the passage of Statute 3 Geo. II, Chap. 25, in which the aid of a jury was obtained in trying questions arising in *quo warranto* proceedings, but there seems to be no expression as to the right to have the questions submitted to the jury. The early practice books are equally silent on the subject. After the passage of 3 Geo. II., Chapter 25, which provides for a jury in such cases, decisions may be found to the effect that such questions must be submitted to a jury, but even then it is not stated whether such ruling is based upon the statute or upon prior existing law or practice. In *Nevill vs. Payne*, 1 Cro.

Eliz. 304, 35 and 36 Eliz., a jury trial was had. In a case decided in 10 Geo. I., where the right to the office depended on the qualification of the electors, the Court made the rule absolute, on the ground that being a matter of right it was fit to be tried by a jury, they being the proper judges of evidence. *King vs. Whitchurch*, 8 Mod. 210. In a case decided in 1731, 5 Geo. II., a rule was granted to show cause why an information in the nature of *quo warranto* should not go against defendant for exercising the office of capital burgess of the town of New Radnor, and his counsel asked the Court to determine the point on the rule for showing cause and not put defendant to the expense of a special verdict, but the Court made the rule absolute, thinking this a matter fit to be determined in

714 a more solemn way. *King vs. Pool*, 2 Barnard, 93. In

King vs. Clarke, 1 East, 38, the Court said: 'The question is put too much *in dubio* by the affidavits by either side for the Court to say that it is not proper to be inquired into by a jury.' And similar remarks were made in *King vs. Bingham*, 2 East, 308. In *King vs. Bridge*, 1 W. Bl. 46, 23 Geo. II., it is said that the case must be tried by a jury. In *King vs. Harwood*, 2 East, 177, it was admitted by defendant that the merits of the election must be submitted to a jury. The present English practice under the crown office rules is stated by Shortt on *Mandamus*, p. 189, to be that either party may obtain a trial with a jury on application for it, otherwise the mode of trial will be by a judge without a jury. But the Court may at any time order the trial to be before a jury. In this Country the Courts which have passed upon the question have not agreed as to whether the right to a jury was a common law right which was preserved by the constitution. A very few of the states are in the same condition as Florida in which all statutes passed in England prior to July 4, 1776, are in force. See note to *McKennon vs. Winn*, 22 L. R. A., 508. Of course, in such states there can be no question because it is settled by the Statute of 3 Geo. II., Chapter 25." 24 L. R. A. 803. It is said not to be a constitutional right in *State vs. Johnson*, 26 Ark., 281; *Wheat vs. Smith*, 50 Ark., 266; *State vs. Minnesota Thresher Mfg. Co.*, 40 Minn., 213; 3 L. R. A., 510; *State vs. Vail*, 53 Mo. 97; *State vs. Lupton*, 64 Minn., 415; 27 Amer. Rep., 253. In *State vs. Burnett*, 2 Ala. 140; *People vs. Doesburg*, 16 Mich., 133. *People vs. Albany & S. R. Co.*, 57 N. Y. 161, it seems to be held that a jury trial is a matter of right, and in *State vs. Allen*, 5 Kan. 213, it is said that the parties were probably entitled to a jury trial. In *Com. vs. Delaware & H. Canal Co.*, 43 Pa. 295, it was said that it was a matter of no im-
715 portance to the parties whether the authority granted to the Courts by the *quo warranto* acts in that state was exercised in the common law form, or in equity form, so long as the right of trial by jury was preserved.

When the information in the nature of *quo warranto* began to be used in this country, and the question arose as to whether the action was of a civil or criminal nature, it arose on the very point made in the sixth assignment of error set out *supra*.

In the case of *State vs. Hardie*, which was an information in the

nature of a *quo warranto*, filed by the solicitors for the State against Hardie for usurping the office of Sheriff, the Court said, in an opinion by Gaston, J.:

"It is objected, in the first place, that an information of the kind before us, is utterly prohibited by the 8th Section of our Bill of Rights, which declares that 'no freeman shall be put to answer any criminal charge but by indictment, presentment or impeachment'. The enquiry is, whether the information in question be, within the meaning of the Bill of Rights, a 'criminal charge'? In every well regulated government there must be some mode by which to put down the usurpation by unauthorized individuals of public power. In the country of our ancestors, and in ancient times, when any of the officers or franchises appertaining to sovereignty, and therefore called royal, were supposed to be held or exercised without lawful authority, the remedy was by suing out the writ of *quo warranto*, to enquire by what warrant the supposed usurper supported his claim, in order to determine the right thereto. This was said to be in the nature of a writ of right for the king, and from what we have seen of the pleadings in it, bore little or no resemblance
716 to a criminal prosecution. See Rastell's entries, *Quo Warranto*. Indeed Mr. Justice Wilmot, in *Rex. vs. Marsden*, 3 Bur., 1817 declares positively that it is not a criminal prosecution, but a civil writ at the suit of the crown, though Chancellor Kent, in the *People vs. Utica Insurance Co.*, 2 Johns. cases in Ch'y, 117, speaks of it as a criminal proceeding. Be this as it may, the remedy certainly much resembled, if in truth it were not a real action; and, like other actions of that family, was subjected in its prosecution to inconvenient delays. On this account, like most real actions, in process of time it became much disused, and its place was supplied by the information in the nature of a *quo warranto*. Originally this was a criminal proceeding. In it the usurpation was charged as an offense, and the offender, upon conviction, was liable to be punished by fine and imprisonment. Such, however, were the conveniences attending the information, as a mode of trying the mere question of right to the office or franchise, that although it never entirely lost its form as a criminal proceeding, it was so modelled as to become substantially a civil action. A fine, indeed, was imposed upon conviction; but it was nominal only—no real *punishment* was inflicted—and it became, before our revolution, the general civil remedy for asserting and trying the right, in order to seize the office or franchise, or to oust the wrongful possessor. See 3 Blk. Com. 262-3; *Rex vs. Francis*, 2 Term, 484; *Commonwealth vs. Brown*, 1 Serg. & Raw. 385; *People vs. Utica Insurance Co.*, 15 Johns. 386.

"Besides this peculiar information, well known as 'the information in nature of a *quo warranto*', there was a mode of prosecution for the punishment of crimes by 'information'. This was, by a suggestion or charge, drawn up in form, and filed on record
717 by the king's attorney general, or by his coroner, or master of the crown office, in the Court of King's Bench; and was deemed sufficient in every case not capital, to call every man to answer for the offense therein charged. There could be no doubt but

this mode of criminal prosecution was as ancient as the common law itself, but the tyrannous use made of it in high prerogative times, especially after jurisdiction of criminal prosecutions by information was extended to other tribunals than the Court of King's Bench, justified subjected it to the reprobation of the friends to freedom. The framers of our Bill of Rights were not school men dealing in metaphysical abstractions, and busied about technical forms, but practical statesmen guarding against real abuses of power, and securing the substantial rights of freemen. They intended to prohibit this mode of prosecution for crimes, and to throw around the object of penal visitation the protection either of a grand jury, or of an enquiry by the impeaching body—before he could be required to plead to a criminal accusation. Such is the purpose of the eight-section of the Bill of Rights; and accordingly, we find it connected with a number of provisions from the 7th to the 10th inclusively, in which are embodied the securities for a fair hearing, full defense, impartial trial, and the administration of justice in mercy to all sought to be convicted and punished because of public offenses. The proceeding before us is carried on *diverso intuitu*, and to hold it prohibited by the Bill of Rights, would be to sacrifice substance to mere form. If, indeed, it should ever be attempted in information of this character to impose a real fine, or to inflict any other punishment, so as to make them in effect criminal prosecutions, such attempts would fall before the explicit prohibitions of the section of the Bill of Rights now needlessly invoked." 1 Ired, 23 N. C., R., 47 to 49.

The same point was raised in the same way in *State ex rel. Dunlap vs. Stewart*, 6 Houston (Del.), 359, 375, 376. It is said in this case that "it is certain that an information in the nature of *quo warranto* had practically ceased to be treated in England, notwithstanding its form, as essentially a criminal proceeding, long before the enactment of the Colonial Statute of this State, upon that subject."

In *Attorney General vs. Delaware & C. R. Co.*, 38 N. J. L. 282, 286, it is said:

"It was further suggested that the proceeding by information was in violation of the ninth paragraph of the first article of the constitution, to the effect that no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury. The old writ of *quo warranto* was clearly of a criminal nature, and the information, which for centuries past, has served as its substitute, partook of the same character. The punishment inflicted under it was often of substantial consequence. But even in Blackstone's time it had 'long been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only.' 3 Blackst. 263. And was then usually considered as merely a civil proceeding. 4 Blackst. 312. After verdict for the defendant in such informations, a new trial may be granted. *Rex vs. Francis*, 2 T. R. 484. The suggestion has not before been made since the adoption of the constitution in 1844, or, if made, it has been disregarded and cannot now prevail."

To the same effect see *State ex rel. Attorney General vs. Vail*, 53 Mo., 97 and 107.

In *Republica vs. Wray*, 3 Dallas (Year 1799), it is said:
719 "The present is the first instance that we recollect an application of this kind in Pennsylvania; and in opening the case, it struck us to be within the tenth section of the Ninth Article of the Constitution, which declares, 'that no person shall for any indictable offense, be proceeded against criminally by information,' except in cases that are not involved in the present motion. But, on consideration, it is evident, that the Constitution refers to informations, as a form of prosecution to punish an offender, without the intervention of a grand jury; whereas an information in the nature of a writ of *quo warranto*, is applied to the mere purposes of trying a civil right and ousting the wrongful possessor of an office."

To the same effect is *Com. vs. The Commissioners of the County of Philadelphia*, 1 Serg. and Raw., 382, 385 (year 1815).

The foregoing cases are brought into stronger light by the case of *Donnelly vs. People*, 11 Ill., 552, in which it is held that an information in the nature of a *quo warranto* is a criminal proceeding, because the statute there provides that a fine shall be imposed.

It was said by this Court in the case of *State vs. Turk, M. & Y.* 287, 293, that neither the old writ of *quo warranto* nor the information in the nature of a writ of *quo warranto* had ever been adopted in Tennessee.

It is true that a different opinion was intimated in the subsequent case of *Bradley vs. Commissioners*, 2 Hump., 427, 433.

In the subsequent case of *State vs. Merchants Insurance and Trust Co.*, 8 Hump., 235, the intimation was that the *quo warranto*, or information in the nature of *quo warranto* still existed in this state, but was regulated by Chapter 55, of the Acts of 1846, which made it
720 the duty of the Attorney General to provide a bill in equity in the Chancery Court or Circuit Court to obtain relief against the abuses of Corporations in the way of forfeiting their charters, or restraining their improper exercise of powers, or the assumption of powers not granted them by law.

In the case of *Attorney General vs. Leaf*, 9 Hump., however it was distinctly held, affirming the case of *State vs. Turk, supra*, that neither the writ of *quo warranto*, nor the information in the nature thereof was ever in force in this State.

In *State vs. Scott*, 2 Swan., 332, the Court applied the Act of 1835, Chapter 54, which made it the duty of the Attorney General to cause to be issued *scire facias*, in the name of the State against Turnpike Companies that should offend in certain particulars, requiring them to appear and show cause why their charters should not be forfeited.

In *State vs. Columbia & Hampshire Turnpike Company*, 2 Sneed, 253, the same Act was applied.

Johnson vs. Curchwell, 1 Head, 146, was based simply on a section of the charter of the special bank therein referred to.

We now come to the provisions of our code. The caption of title 11, of the Code, is, "Of special actions and proceedings." The caption of Chapter 8, thereunder is, "Of proceeding in the name of the

State *vs.* Corporations, and to prevent the use of usurpation of office."

This chapter embraces sections 5165 to 5187, inclusive of Shannon's Code, and Sections 3409 to 3431, inclusive of the code of 1858.

Section 5165 reads:

"An action lies, under the provisions of this chapter, in the name of the State, against the persons or corporations offending, in the following cases—Sub section 3, when any persons act as a corporation within this State, without being authorized by law, (4) Or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation. (5) 721 Or exercised powers not conferred by law. (6) Or fail to exercise powers conferred by law and essential to the corporate existence."

In section 5167, it is provided:

"The suit is brought by bill in equity, filed either in the Circuit or Chancery Court of the County or District in which * * * the corporation, or supposed corporation, holds its meetings, or has its principal place of business,

SECTION 5168. "The suit is brought by the Attorney General for the District or County, when directed so to do by the General Assembly, or by the Governor and Attorney General of the State concurring."

5169. "It is also brought on the information of any person, upon such person giving security for the costs of the proceedings, to be approved by the Clerk of the Court in which the bill is filed."

SECTION 5171. "The bill will set forth briefly, and without technical forms, the grounds upon which the suit is instituted, and the suit will be conducted as other suits in equity."

SECTION 5172. "Such issues of fact as may become necessary to try by jury in the progress of the cause, will be made up under the direction of the Court, and submitted to a jury impaneled for-with."

SECTION 5173. "The Court is authorized, upon the filing of the bill, properly verified, in all proper cases, to grant attachments and injunctions, and appoint receivers to effect the ends of justice, and to make all such orders, rules, and decrees, according to the practice of a Court of Chancery, as may be necessary to accomplish the objects had in view."

SECTION 5180. "When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully 722 holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs."

SECTION 5181. "If it be adjudged that a defendant corporation has, by neglect, nonuser, abuse, or surrender, forfeited its corporate rights, judgment will be rendered that the defendant be altogether excluded from such rights, and be dissolved; and also that the corporation, its directors or managers, as the case may be, pay the costs."

This chapter of the Code was drawn almost entirely from chapter 55, of the Act of 1845-6 above referred to.

With reference to this chapter of the Code it was said by this Court, in State *ex rel. vs.* M. J. Wright, 10 Heisk., 237, 244,—after

referring to the ancient writ of *quo warranto*, and the information in the nature of *quo warranto*, and the English Statutes upon that subject,

"These statutes made a great stride toward English liberty and the limitation of the royal prerogative, but the writs were issued under the sanction of Courts of law; they were not prohibitory writs, and they still lacked the remedial vigor which has been superadded to our kindred remedy by engrafting upon it the flexible and subtle attributes which belong to equity jurisprudence. It is something more than, than the ancient writ, and whether initiated in a Court of law or a court of equity, it is, nevertheless, made and 'equity proceeding,' and carries along with it all the vast remedial incidents of a court of equity, by injunction and otherwise."

Other cases upon the same subject are *Hooper vs. Wray*, 3 Shan. 145, 151, 152; *State vs. Turnpike Co.*, 1 Shan., 511; *State vs. McConnell*, 3 Lea, 332, 335, 338; *State vs. Campbell*, 8 Lea, 74, 76; *State vs. Agee*, 105 Tenn., 588; *State ex rel. vs. Turnpike Co.*, 112 Tenn., 615; *State ex rel. vs. Telephone & Telegraph Co.*, 114 723 Tenn., 194.

We need not refer to, specially, any of the cases just mentioned, except *State vs. McConnell* and *State vs. Telephone & Telegraph Co.*

In *State vs. McConnell*, after stating the fact that neither the ancient writ of *quo warranto*, nor the information in the nature thereof, was ever in force in this State, the opinion continued:

"Both the State and individuals were remitted to other remedies for the accomplishment of the ends aimed at by those proceedings. The Legislature, from time to time, passed acts which were intended to answer, in particular instances, the same purposes. Some of these acts, with supplementary provisions, were brought forward into the Code. * * * The purpose for which the suit 'by bill in equity' is given by the sections of the Code referred to, are those which were attained at common law by the writ of *quo warranto*, or by information in the nature thereof. In other words, the statute gives a new remedy for old wrongs. The settled rule in such case is to construe the law so as to interfere as little as possible with the previous practice, and the decisions of the courts on the subject of legislation."

In *State ex rel. vs. Telephone & Telegraph Co.*, *supra*, the sections of the Code above referred to were applied to the case of a foreign corporation doing business in this State, for the purpose of ousting such corporation from the State. Similar provisions in other states are applied in the same way. 6 Thompson on Corporations, section 7944, citing: *State vs. Boston &c., R. Co.*, 35 Vt., 433; *State vs. Fidelity &c. Insurance Co.*, 39 Minn., 538; *State vs. Wes. Union Life Ins. Co.*, 47, 81-167-8 L. R. A., 129; *State vs. Insurance Co.*, 49 Ohio, 81-440, 34 Amer. St. Rep., 537; *State vs. Fidelity &c. Insurance Co.*, 77 Ohio, 648, 16 L. R. A., 611;

See also the following cases:

State vs. Fidelity & Casualty Insurance Co., 77 Iowa, 648; *State vs. Standard Oil Co.*, 61 Neb., 28; 87 Amer. St. Rep., 449; *State vs.*

American R. R. Co., 65 Kan., 847; and see *McGinnis vs. Boston & M. & Con. Mining Co.*, 29 Mont., 448; *Attorney General vs. Electric Storage B. Co.*, 188 Mass., 239.

This brings us to the act on which the present litigation is based. Section 2 provides: "That any corporation chartered under the laws of the State which shall violate any of the provisions of this Act shall thereby forfeit its charter, and its franchise, and its corporate existence shall thereupon cease and determine. Every foreign corporation which shall violate any of the provisions of this Act is hereby denied the right to do, and is prohibited from doing business in this State. It is hereby made the duty of the Attorney General of this State to enforce these provisions by due process of law."

It is clear that the last sentence in the section above quoted had reference to the provisions of the Code which we have referred to, and the recognized practice thereunder. Accordingly the Attorney General filed a bill in the name of the State, "by and upon the relation of her Attorney General."

We pause at this point to note that the proceeding under which the defendant in the present case is brought before the Court is the same that applies to all domestic corporations, and to all foreign corporations, within the borders of this State, and there is no other process of law known to the practice of this State by which
725 such a litigation can be inaugurated or conducted. It is a purely civil proceeding, and judgments eventuating thereunder, to the effect that a corporation or corporations defendant thereto shall forfeit their charters, or be ousted from the State, as the case may be, are civil judgments, and not criminal sentences. Therefore, the provisions of our Constitution referred to under the sixth assignment, ("that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment," Article 1, sec. 14), do not apply. We have seen from the cases cited from North Carolina, Pennsylvania, New Jersey, Delaware and Missouri, that similar provisions in the Constitutions of those States are held not to apply, even under informations in the nature of a *quo warranto*. This being a civil proceeding, the rule as to reasonable doubt would not apply nor any other rule peculiarly applicable to criminal proceedings. The right of trial by a jury, the deprivation of which is complained of in the assignment of error is preserved under section 5172 (3416), of the Code. It is true that a jury is not permitted in cases of this kind to render a general verdict, as in ordinary cases at common law. Nor does it appear, as shown by reference to cases *supra*, that at common law juries had the right to render such general verdict, when impaneled under proceedings in the nature of a *quo warranto*. But, however, this may be, since that proceeding has never been in force in this State, and our Code provisions are entirely new, though intended to serve the same purpose, we would not be bound by the rule at common law upon this subject, but would be at liberty to make such provisions in respect of a jury trial as the Legislature might deem proper. The practice, it is true, is assimilated as far as may be convenient to the

old practice, but this does not apply to absolute rights inhering in the new process inaugurated by the Code.

The conclusion here announced was reached by the Court in the case of *State ex rel. vs. Schlitz Brewing Co.*, 104 Tenn., 715, and perhaps we need not have gone further than to cite that case, but inasmuch as the authority of that case was attacked because the conclusion reached therein as to the constitutionality of the Anti-trust Act of 1897 had been disapproved by the Supreme Court of the United States in considering a similar Illinois statute in the case of *Union Sewer Pipe Co. vs. Connelly*, 184 U. S., 554, and because the case has been inferentially disapproved in one other respect by this Court, we concluded to again examine the question. However, the authority of that case on the particular point which we now have under consideration is unshaken. The Act of 1897 which the Court had under examination in that case was very similar to the Act of 1903. With the exception, of its fourth section, (which was similar to the objectionable clause in the Illinois Act), it is substantially the same as the present Act, and section 2 is the same as section 2 of the present Act. It was held in that case, *Id.* 746, 751, that it was not necessary that there should have been an antecedent conviction in a court of law, but that a bill in equity might be filed at once.

But it is insisted by the defendant that section 3 of the Act of 1903 (Chapter 140) *supra*, declares "that any violation of the provisions of this Act shall be deemed, and is hereby declared to be destructive of full and free competition and a conspiracy against trade, and any person or persons who may engage in any such conspiracy or who shall, as principal, manager, director or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders made in furtherance of such conspiracy, shall upon conviction be punished by a fine of not less than one hundred dollars or more than five thousand dollars, and by imprisonment in the penitentiary not less than one year nor more than ten years; or in the judgment of the Court, by either such fine or imprisonment."

The argument is that, inasmuch as this section, just reproduced, declares the doing of the things referred to in section 1 a conspiracy against trade, and affixes a fine and imprisonment in the penitentiary, or either, as punishment, thereby putting persons in the category of criminals, and giving them the advantage of the rules of evidence and the presumptions applicable in criminal cases, also the benefit of the statute of limitations applicable to criminal cases, there is a discrimination against corporations, if they be not similarly treated, that is, proceeded against by indictment, and thereby enabled to enjoy the benefit of the rules and privileges above mentioned.

Section 1 of the Act declares what shall be unlawful; section 2 provides a civil remedy against corporations for such violations; section 3 provides a criminal remedy against natural persons; section 4 provides a civil remedy against both corporations and natural persons in favor of any one who may be injured or damaged by the things legislated against in the first section; section 5 has reference to the matters contained in section 3.

Now was it competent for the Legislature to provide a civil remedy against corporations and a criminal remedy against natural persons? Is there any good reason for the discrimination? It seems that there is a good reason in the fact that it is impossible to punish corporations by imprisonment, a kind of punishment which can be inflicted only upon natural persons. Again the deprivation of business, or charter rights, or the deprivation of the power to exercise business or charter rights within the State through a judgment of ouster, is a legal consequence which cannot be inflicted upon natural persons
728 in the very nature of things, because wholly inapplicable to them. The argument of the defendant is in substance that inasmuch as natural persons may be consigned to the penitentiary under this Act by a criminal prosecution, therefore if ousted at all from the State, a corporation should be ousted by the same sort of a prosecution. This seems to us a *non sequitur*. The punishment inflicted upon the corporation is one peculiar to corporations, and is inflicted in the same manner in which this form of correction has been applied to corporations ever since there has been any public redress at all in this State for corporate wrongs, and is the same, in substance, which has been applied by English speaking people for a time beyond which the memory of man runneth not to the contrary.

The defendant insists that it should have been indicted. To what purpose? To suffer in a criminal case a judgment which has for ages been held appropriate only in civil controversies. Has the defendant a right to complain because it was sued in equity instead of indicted in the criminal Court? Why should it have been indicted? It could not have been imprisoned, and no fine was authorized against it. If the statute had declared a fine against it, an indictment would have been proper; or if the Act had simply declared unlawful the things it denounced, there might still have been an indictment, as for a misdemeanor; but having declared in terms the legal consequences of a breach of the legal inhibition, there could be no indictment. But the defendant says the legal consequences of the breach, I am to have imposed upon me, and am to suffer through the machinery of a Court of Equity, where I cannot have the benefit of the reasonable doubt, or the benefit of the Statute of limitations which the
729 sovereign concedes in criminal cases, but does not in its own suits in Civil Courts, and I am also deprived of the right to a general verdict of guilty, or not guilty, according to the course of practice in Criminal Courts. But suppose we turn the case about, and consider what a natural person might say. He complains: I am subjected to the humiliation of an indictment for a felony, and if convicted I may be sent to the penitentiary for a term of years, while a corporation that does the same thing is subjected merely to the loss of a civil power, the right to do business; while I am subjected to the humiliation of the Criminal Court, a corporation for the same act enjoys the benign principles that are administered in a Court of Equity. Is not the case of the natural person as strong in the matter of discrimination as that of the corporation? What then? Is it true that for the same breach of duty a corporation and a citizen must both be indicted? Although owing to the differing natures of

the natural person and the legal person the same punishment cannot be inflicted? Although it is impossible to reach the same end as to both by the same means? Although as to the natural person it may result in imprisonment in the penitentiary for ten years, and as to the corporation only in a fine or money judgment? Would there be no inequality in that result? But will it be said that the legislature might have authorized an indictment and annexed as punishment the forfeiture of corporate franchises in case of domestic corporations, and ouster for foreign corporations? If so, there would have been converted into a criminal sentence a judgment which has been, from time immemorial, held to be but a civil determination. Shall all these hoary precedents be overturned to attain a state of harmony with an abstract theory? The true theory is that corporations and natural persons are so diverse in some respects that there is no basis or common ground of comparison, but a necessity of simple antithesis. And such is the particular aspect in which they are presented in the present litigation.

For the reasons stated, we do not think the defendant has sustained the objections made in the sixth, ninth, tenth and eleventh assignments.

In what has been said, we have assumed that foreign corporations doing business in the State, are entitled to the same status and rights as domestic corporations; and in truth they are so entitled under the act in question, ch. 140, Acts of 1903, in respect of proceedings to stop them from doing business here, and it seems from the authorities cited that they have been treated with the same consideration in many other states. But it is well to remember, and to remark, that they have no contract rights with the state, they are here merely on sufferance, guests as it were, of the state, and have no right to complain of the procedure which the state has adopted to try the question whether they have abused the courtesy shown them, and have thereby forfeited a continuance of it. That the power exists in the State to otherwise deal with them is shown, and illustrated in *Insurance Co. vs. Craig*, 106 Tenn., 621, 641 *et seq.*, wherein the Court sanctioned the provision in the insurance laws of the State, giving power to the Insurance Commissioner without proceedings in the ordinary courts of the State to exclude foreign insurance companies for certain violations of law, after they had obtained a license to do business here. The principle is so obvious that we need not pursue it further.

What has been said disposes of the seventh and eighth assignments, which are, in effect that the Chancellor erred in not applying the statute of limitations. There is no statute of limitations applicable to the State in civil actions. Shan. Code, sec. 4453.

There is indeed a statute of limitations embraced in the Code (Shan. Secs. 6942 to 6945), but not at all applicable to the present case. Under these sections, the limitation for gaming is put at six months, other misdemeanors, twelve months. Certain charges of felony are subject to the following limitations, viz: prosecutions for breaches of trust, petit larceny, rape, attempt to commit rape, enticing any unmarried female for the purpose of marriage or prosti-

tution, negligence punishable by imprisonment in the penitentiary, or any offense punishable by imprisonment in the penitentiary where the punishment is expressly limited to two years and less—are all limited to three years next after the commission of the offense. (Sec. 6944.) For perjury and subornation of perjury, and all offenses not embraced in sec. 6944, where the punishment is expressly limited to five years or less, the limitation is five years. None of these limitations could in any event apply to a prosecution under sec. 3 of the Act in question here, because the offense therein created is a felony, notwithstanding the punishment may be by fine, and imprisonment in the penitentiary not less than one or more than ten years, or in the judgment of the Court, by either fine or imprisonment. *Rafferty vs. State*, 91 Tenn., 655, 657, 658. On the last page referred to, it is said: "The fact that the punishment for the attempt is in the alternative, either by imprisonment in the penitentiary, or by fine and imprisonment in the County jail, does not make it any less an offense punishable by imprisonment in the penitentiary, or take from it the characteristic of a felony." Therefore the limitation for misdemeanors would not apply, and the case does not fall within any of the excepted classes of felonies. Nor does the case before us fall within the class of cases represented by *Turley vs. State*, 732 3 Heisk., 11. Those are cases wherein several crimes were included in one indictment, under the principle of gradation. Here we have, under the third section, a single crime with alternatives of punishment.

We shall next consider the fourth, fifth and twelfth assignments.

The fourth assignment is that the Chancellor erred "in not finding and decreeing that the alleged agreement, arrangement, or combination, if unlawful, was unlawful for that it was in violation of the Acts of Congress relating to interstate commerce, only, and not in violation of the said act which is chapter 140 of the Acts of 1903, and beyond the jurisdictions of that Court."

The fifth assignment is that the Chancellor erred, "in not finding and decreeing that if the alleged arrangement, agreement, or combination be a violation of the said Act of Tennessee, of 1903, it is such violation only because it violates provisions of said act regulating interstate commerce, and which for that reason are void, and that no decree can be entered in this cause for a violation thereof."

The twelfth assignment is that the Chancellor erred "in not holding and decreeing that the said Act is null and void for that it is in violation of Article 1, section 8, sub-section 3 of the Constitution of the United States, in that it is an attempted regulation of commerce among the several states."

On the subject referred to in these three assignments the case arising in the present record is substantially the same as considered by the Court in *Standard Oil Co. vs. State*, 117, Tenn., 618—(*Holt's Case*), and we are content to reproduce here what was said in that case, viz:

733 "The Legislature was co-nizant, we must presume, that it had no power to enact laws regulating interstate commerce, and did not intend to enact an unconstitutional law, in

whole or in part. There was already then in force an act of Congress, the Sherman Anti-Trust Act, enacted in 1890, fully covering that subject, the provisions of which were much broader and more effective than those of this Act, and could be enforced to their fullest extent by the stronger and more vigorous government. There was neither the power nor the necessity for enacting any legislation relative to interstate commerce. The wrongs to trade which were intended to be corrected and punished were those being perpetrated against commerce within the state, which congress could not reach, and for which there was then no efficient remedy. The only statute then in force in Tennessee relative to these abuses was one making it an ordinary misdemeanor for two or more persons to conspire to commit any act injurious to public morals, trade, or commerce (Code (Shannon's Ed.), sec. 6693), and that there was a necessity for a more drastic one was a matter of common knowledge and generally recognized, and the enactment, of this Statute was an attempt to supply it.

"We give no force to the word, 'importation,' appearing in section 1, because we think it was inaccurately used in referring to articles already imported; that is, that the phrase 'importation or sale of articles imported into this State' was intended to include and describe, among the articles of commerce to be protected, those which had been imported from other states and countries, commingled with the common mass of property in this State, and no longer articles of interstate commerce. It is well settled that commerce in such imported articles may be regulated by State legislation. *American Steel Wire Co. vs. Speed*, 110 Tenn., 546, 75 S. W., 1037, 100 Am. St. Rep., 814; S. C., 192 U. S., 500-519, 24 Sup. Ct., 365, 48 L. Ed., 538. It is certain that merchandise

of this character was intended to be included within the provisions of this Act, otherwise commerce, in the vast amount of valuable property of foreign production and manufacture that was then and is now in this State, would be wholly unprotected from the abuses legislated against. In no other way is such property mentioned, included, or referred to in the statute, and this phrase must be held to apply to it. A large part of the wealth of the people of the State is invested in imported property, and it cannot be presumed that the legislature intended to discriminate against it. It needed the same protection as that of domestic growth or manufacture. The legislature clearly intended to prohibit trusts, combinations, and agreements affecting all commerce not covered by the federal statute, and upon which it had a right to legislate. It did not intend to stop short of its power or to exceed it.

"The case of *Rector of Holy Trinity Church vs. United States, supra*, is much in point here. There it is said:

"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted and the reports are full of cases illustrating its application. This is not substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words

broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words makes it unreasonable to believe that the legislator intended to include the particular act.'

735 "And again: 'The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and therefore, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the Courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute.'

"But if the act did prohibit the abuses legislated against in the importation of articles in this State, such provision does not vitiate the entire statute; it is constitutional and valid, so far as it affects commerce in articles which have been imported into the State and become commingled with the common mass of property of the State and subject to its laws, as articles of domestic production and manufacture.

"It is evident, from what we have already said, that the prevention of unlawful contracts in relation to the importation of articles was not the inducement of the enactment of this statute, but that the primary and chief purpose of the legislature, beyond all question, was to protect commerce within the State. Its provisions upon this subject are to no extent and in no manner dependent upon one protecting the importation of merchandise from other states and countries. They are complete, and capable of effective enforcement, without one in relation to interstate commerce. Such statutes, notwithstanding they contain clauses regulating interstate commerce,

a matter not within the power of the States, have frequently
736 been sustained and enforced by this Court and the Supreme Court of the United States, so far as they relate to commerce within the State, *State vs. Scott*, 98 Tenn., 254, 39 S. W., 1, 36 L. R. A., 461; *Austin vs. State*, 101 Tenn., 579, 48 S. W., 305, 50 L. R. A., 478, 70 Am. St. Rep., 703; *Kidd vs. Pearson*, 128 U. S., 1, 9 Sup. Ct., 6, 32 L. Ed., 346; *Plumley vs. Massachusetts*, 155 U. S., 461, 15 Sup. Ct., 154, 39 L. Ed., 223.

"The plaintiffs in error are also mistaken in their conception of the charge made in the indictment, and of the object and effect of the evidence introduced to prove it. The express averments of both counts of the indictment are that the defendants therein named conspired, contracted, and agreed with S. W. Love for the purpose and with the view to lessen and destroy full and free competition in the sale of a certain article of sale, coal oil, imported into this State; and the proof introduced by the State upon the trial was for the purpose of proving an agreement to lessen and destroy competition in the sale of coal oil which had, previous to the agreement,

been imported into the State, and was then stored and upon sale at Gallatin. There is no averment that the agreement was made with a view to lessen, or intended to lessen and destroy, competition in the sale of coal oil to be imported by the Evansville Oil Company, and no proof was offered to that effect.

"The charge upon which the plaintiffs in error were indicted, tried, and convicted is the alleged making of an unlawful contract and agreement with S. W. Love to lessen and destroy competition in the sale of coal oil which the Standard Oil Company had imported into this State and had, at the time of the agreement, stored in its storage tanks at Gallatin, and there offered for sale. The charge is that the agreement was made to protect oil already imported, and not oil to be imported. The evidence offered

737 tended to prove an agreement conceived and effected by the Standard Oil Company and its agents to protect the oil of the principal then stored in Gallatin, from competition with that about to be imported and offered for sale by a competitor, and not to protect that of the Evansville Oil Company yet to be transported there.

"A combination affecting interstate commerce is none the less a violation of the federal anti-trust statute and punishable under it, where the agreement made incidentally affects interstate commerce; and the same rule will apply to combinations made in violation of the statute of the State upon the same subject, where interstate commerce is incidentally affected. If it were otherwise, neither the federal nor the state laws could be enforced in any case.

"The importation of oil to be made by the Evansville Oil Company was only the occasion, the incentive, of the conspiracy charged in relation to that theretofore imported by the Standard Oil Company.

"It is true the oil of the Standard Oil Company had been an article of interstate commerce, but it was not when the agreement with S. W. Love was made. It was then at rest in this State, and was subject to its revenue laws and the police power of the State. That it was subject to the revenue laws is conceded by the Standard Oil Company, and it had taken out a license and paid the revenue required and imposed by the laws of the State. That it was in its then condition subject to the police power of the State cannot be doubted. *Am. Steel & Wire Co. vs. Speed*, 110 Tenn., 546, 75 S. W., 1037, 100 Am. St. Rep., 814; *S. C.* 192 U. S., 500-519, 24 Sup. Ct., 365, 48 L. Ed., 538; *Brown vs. Houston*, 114 U. S. 622, 5 Sup. Ct., 1091, 29 L. Ed., 257; *Pittsburg. & Co. vs. Bates*, 156 U. S., 577, 15 Sup. Ct., 415, 39 L. Ed., 538." 117 Tenn., 642-648.

738 This brings us to the assignments filed to test the correctness of the Chancellor's ruling upon certain items of evidence. These assignments are Nos. 13 to 20, inclusive.

The thirteenth, fourteenth, fifteenth and twentieth assignments are to the action of the Chancellor in refusing to admit oral evidence of the contents of a report which was made by Mr. Holt to Mr. Comer. There was no error in this action of the Chancellor. It appears from the evidence of Mr. Holt that the report referred to

was prepared in triplicate, and one copy sent to Mr. Comer at Nashville, one to the Cincinnati office, and the other retained by himself; and that the copy retained by himself was still in his possession. There is some evidence, but not of a satisfactory nature that the copy sent to Mr. Comer, and that sent to the Cincinnati office, had been mislaid or destroyed, incident to moving the Nashville office to Louisville, and the Cincinnati office to Covington, Kentucky; but if this evidence be treated as establishing the fact of such misplacing or loss of the Nashville and Cincinnati copies, no reason is assigned for the failure to produce that retained by the witness Holt. All these were originals, and secondary evidence of their contents could not be properly admitted, while either was in existence, and accessible. 2 Wigmore on Ev., sections 1232, 1233; 2 Elliott on Ev., sec. 208.

The sixteenth assignment questions the action of the Chancellor in excluding, on exception of complainant, a paper purporting to be a copy of a letter written by Mr. Comer to Mr. Holt, December 24, 1903. The ground of the exception in the Court below was that said paper offered, purported to be a copy copied into a transcript on file in the Supreme Court, and because it was an attempt to prove by oral testimony the contents of an alleged letter, when the original thereof had been given by Holt to J. E. Comer, special agent of the
739 defendant, and a letter press copy thereof was in the Nashville office of the defendant, as shown by the testimony of Mr. Collings, the Vice President of the Company.

We are unable to find in the testimony of Mr. Collings anything about a letter press copy in the office at Nashville, but the existence of such a copy is a fair inference from a statement contained in the evidence of Mr. Holt. However, aside from this, we do not think that the absence of the original is properly accounted for; therefore the objection was properly sustained in the Court below, and the assignment must be overruled.

The seventeenth assignment is based on the following ruling of the Chancellor in refusing to admit a paper purporting to be a copy of a letter written by Mr. Collings to Mr. Comer, under date of Dec. 26, 1903. In stating the ground of the objection in the Court below, it was said by the counsel for the State: "It is claimed that said letter was sent to said Comer as special agent, and, therefore, it should be among the papers of defendant company at its Nashville office, and moreover, said Collings only thinks, and does not know that said copy is out of his own letter book."

The eighteenth assignment relates to the action of the Chancellor in sustaining an exception to a paper purporting to be a copy of a letter addressed to Mr. Collings, by Mr. Comer on December, 28, 1903. The ground of the objection was that the absence of the original was not satisfactorily accounted for, and that while Mr. Collings produces what purports to be a tissue copy, he has no personal knowledge of it, but "thinks he got it from Nashville, and thinks it was furnished to him by Mr. Coons."

The nineteenth assignment is based upon an objection sustained in the Court below, to the testimony of Mr. Collings in relation to

740 an alleged letter, under date of December 28th, 1903, and an alleged copy of said letter, claimed to have been written by him to J. E. Comer. The ground of the objection was, "because the original of said letter is not produced, but said Collings shows that he sent the original of said letter to Comer, and he has no personal knowledge of the alleged tissue copy produced by him and copied into the record as above stated."

We shall consider these three assignments together. The record sustains the ground of the objection referred to in the seventeenth assignment; the assignment must therefore be overruled. The testimony of Mr. Collings sufficiently accounts for the absence of the original of the letter referred to in the eighteenth assignment, but he does not properly account for the alleged tissue copy, and on this ground the Chancellor acted correctly in sustaining the objection; this assignment is therefore overruled. The record sustains the objection made in the Court below to the paper referred to in the nineteenth assignment; that assignment is therefore overruled.

This brings us to the merits of the controversy, suggested by the second and third assignments, which are in substance that the Chancellor erred in not dismissing the original bill on the merits, and in finding and decreeing that the defendant was in fact guilty of a violation of the provisions of the said anti-trust act of 1903.

The facts are stated with substantial correctness in the original bill. There is no doubt that Mr. Comer was in control of Middle Tennessee in behalf of the defendant, as its manager within the district to which that division of the State belonged under the apportionment made by the defendant among its agents and servants. Mr. Comer testifies that his "territory" was, East Tennessee, up to Bristol, Middle Tennessee, a small portion of Kentucky, North Carolina, and a small portion of Northern Georgia—no considerable domain; that he was general manager for this territory, and had general superintendency of the marketing of defendant's products therein, and control of its local agents and salesmen. Mr. Holt was denominated a salesman. His territory was Middle Tennessee, in which was located the town of Gallatin. He would cover his territory once in each month. His duties were to sell refined oil, gasoline, and naptha, also special goods such as candles and oil, grease, heaters, and lamps, to call on the merchants who bought from tank wagons, sell them additional storage, and arrange the routes so as to make it convenient for the agent to dispose of each tank wagon load of oil on each trip to the country; also to call on the merchants in regard to the service that the company's local agents were giving them at the various points where substations had been established, and finding out whether the agent was attending to his duties in delivering oil promptly, and ascertaining whether they had any complaints to offer against the agents in attendance; also to go down to the station or warehouse, where the tanks were located, and to look over the storehouse to see if everything was in order; also to take an inventory of the oil on hand, and go over the reports of the local agent to learn whether he was making them properly, and making them up properly. He was under the

control of Mr. Comer, and was required to report on all these matters to him. Holt says in his testimony: "I was to make a complete report every day of pretty near everything I said."

O'Donnell Rutherford was what is called a sub agent or local agent. His duties were to receive oils shipped to Gallatin for distribution; to make deliveries of such oils, under the supervision and direction of the Nashville office, and to render to that office reports covering his sales and the work that he performed at Gallatin; and to make daily reports. These daily reports were required to show

742 sales made at Gallatin, and he was to send in invoices, and to make deposits in the local banks and report such deposits.

The daily reports were not required to cover the quantity of oil on hand. He was required to take an actual inventory and report the amount then on hand at the close of each month. This report was required to specify the number of inches of oil in the storage tank; also the number of barrels of oil or other goods he might have in his storage tank or warehouse. By the number of inches in the storage tank is meant this: For example, if a storage tank had a diameter of ten feet, the agent was required to put a rod into the tank and get the number of inches of oil in that storage tank, and if it was five feet or sixty inches he reported that, as the amount of oil on hand in the storage tank. From the data thus furnished a computation would be made at the main office, and thereby the number of gallons on hand ascertained. The sub-agent as a rule was required to send in a memorandum report to the main office over him, in this case, the Nashville office, once a week, to enable the stock clerk to know the amount of oil on hand, so that he could order oil before the exhaustion of the supply; but this was never considered necessarily an accurate inventory.

Over Mr. Comer, Mr. Holt, and Mr. Rutherford, was Mr. Collings, the second vice president of the Company, and its general manager, who was located at Cincinnati. However, he gave no orders to Holt or Rutherford, they looked only to Comer who was their immediate superior.

Mr. Comer did not fix prices; that was the duty of Mr. Collings.

At the date of the transaction complained of, in the present proceeding, the defendant had on hand, stored at Gallatin, fifteen thousand, three hundred and sixty three gallons of oil. Gallatin 743 was its distributing point for the surrounding country, for about twenty or twenty five miles.

The defendant had practically a monopoly of that market when Mr. Rosemon, agent of the Evansville Oil Company, appeared in Gallatin, and vicinity and sold sixty barrels of oil.

At this date, about Oct. 5th, 1903, there was considerable complaint by the purchasers of Oil, that is consumers in Gallatin and in the neighboring country, of the inferior grade of oil which the defendant was selling. The explanation offered by defendant was, that it had received a bad tank of oil, and the inference was that when that tank was used up a better grade would be put on the market. However, there had been, from time to time, complainants during the preceding twelve months or so, of inferior oil. The complaint made by consumers, at the particular period we have

under examination, was that the oil had water in it, and would sputter. There is some evidence on the part of the defendant that the complaint was purely imaginary, and that the oil burned well. However, the weight of the evidence is that it was an inferior grade of oil.

The oil which was sold by Mr. Rosemon, as agent of the Evansville Oil Company was of a very much superior grade to that sold by the defendant, and only one cent higher; that oil having been sold at 14½ cents, while the defendant was selling its oil at 13½ cents. But, when the difference in equality is taken into consideration, the evidence shows that the oil of the Evansville Oil Co. was worth 2½ cents more than that of the defendant company; that is to say, the defendant was selling an inferior grade of oil at a high price.

When Mr. Comer learned that the agent of the Evansville Oil Company had sold sixty barrels of oil at Gallatin, he summoned Mr. Holt from a distant part of his territory, to go to Gallatin and look after his trade. His instructions to Mr. Holt were to get the orders countermanded. Mr. Holt acquiesced in the instruction and obeyed it with the following result:

He proceeded to Gallatin, and, in company with the local agent Mr. Rutherford, called upon Mr. S. W. Love. Mr. Love on being asked to state what took place, said what will you take to countermand that order? And I said, referring to Holt: "He came in and asked me, said 'What order?' And he said 'This ten barrel order you bought from Rosemon.' I said 'I don't know; what will you give me?' He said, 'I will put you one hundred gallons of oil in the tank, if you will countermand it.' I studied a while, and told him I would do it. You see, I got more out of the hundred gallons than out of the ten barrels, and no trouble, so I turned it down right straight. 'What did you do then?' A. We went around to the Telegraph Office, and he wrote the dispatch out, and I signed it, and he paid the charges. Q. You went together to the telegraph office? A. Yes, sir. Q. And he wrote it out? A. And I signed it, and he paid the charges."

A copy of the telegram was shown to the witness, and identified as follows:

"GALLATIN, TENNESSEE, Oct. 12, 1903.

To Evansville Oil Co., Evansville, Ind.:

Kindly countermand my order for ten barrels, oil.

(Signed)

S. W. LOVE."

The witness was further asked: "Did anything else pass between you and Mr. O'Donnell Rutherford and C. E. Holt, with reference to this matter? A. No sir. Q. You have stated all that happened? A. Yes, sir."

The witness stated that he did not enter into any agreement with Mr. Holt or Mr. Rutherford, or any other agent of the Standard Oil Company, to increase the price of oil, or reduce competition in oil in Gallatin; that he did not enter into any

such agreement with Mr. Lane, Mr. Cron, or Mr. Hunter; that he did not know of the countermand of the other orders until after they were countermanded. He also stated that he did not make any agreement with reference to the oil that the defendant had stored at Gallatin; that he did not know as a matter of fact how much the company had on hand at the time, but that it had storage room enough to "keep two or three cars."

He further testified that the hundred gallons of oil promised him to countermand his order was delivered to him the next day or the day after.

On cross-examination he testified:

"Q. Why did they tell you they wanted to countermand that order? A. I don't know, sir, unless it was to stop the oil from coming in here. Q. Wasn't it to prevent that oil coming here in competition with their own oil which was being sold here in Gallatin. A. It looks to me that it was. Q. And that was your understanding at the time, wasn't it? A. Yes, sir, I think it was."

On re-examination he said:

"You said that your understanding was that that order was countermanded to stop competition. Did you mean by that, you had an understanding with Holt or Rutherford to that effect? or that is your interpretation of what was done? A. That is my interpretation of what was done. Q. Did you have any understanding with them about it? A. No, sir. Q. No discussion of that point in any manner, shape or fashion? A. No, sir, I just supposed that was what it was done for. Q. Just a supposition of yours? A. Yes, sir."

746 The transaction with Mr. Lane is thus stated in his testimony:

"State what happened with reference to countermanding this order of yours? A. Well, some time late in the evening; I suppose it was October 12, you say that is the date. Q. That is the date of the Love transaction? A. Well, Mr. Rutherford and Mr. Holt, the Standard Oil representatives, came over to our place of business and asked me if I didn't want to countermand the order for that oil, and I said, what oil? and he said, the oil you bought from the Evansville Oil Company; and I said, no, I guess not; and he says, why, what is the matter? and he went on to say he had secured the countermand of all the other merchants that had bought oil from him here, and I had just as well countermand my order, for I would not get the oil; they would not ship five barrels of oil here; and I says well, there is no use of countermanding if they will not ship it, I will just let it go, and Holt and Rutherford, one, or possibly both of them spoke up and said, if you will countermand the order we will give you fifty gallons of oil, and I says, all right, let her rip; so they got out a telegram and wrote out a countermand and asked me to sign it, and said they would send it, that was the last I heard of it. I asked Mr. Rutherford if he would see that I got the oil, and he said he would."

Mr. Rutherford thereupon delivered to Mr. Lane the following:
"October 1st, 1903. This is to guarantee that I will give you fifty

gallons of oil free, for the consideration that I cancel my order given to the Evansville Oil Co.

(Signed)

O. D. RUTHERFORD,
Agent, Standard Oil Co."

747 The peculiar phraseology of this paper, in the use of the pronouns, is accounted for by the fact that Lane himself drew up the paper, and handed it to Rutherford for signature. In his testimony, Lane calls it "a due bill," for the oil which was promised him.

In original examination, this witness was asked:

"Q. Now did you enter into any combination, or agreement, or conspiracy, or contract? A. That was all the agreement I had with anybody. Q. To lessen the competition in oil at Gallatin, or increase the price, or enhance the price of anything of that kind? A. Not that I knew anything about; all I did was to give an order for oil, and countermand it, under the circumstances I stated. Nothing was said about any conspiracy or agreement. Q. Did you agree, with reference to that matter, with the other merchants, Mr. Cron and Mr. Hunter and Mr. Love? A. I didn't see the other merchants at all; the only men I saw was Holt and Rutherford. Q. Did you send any word to them, or did they send any word to you? A. No, sir; nothing said at all. Q. Did you know they had or had not, when you did. A. Only by what Holt said? — He said he had seen them? A. Yes, sir. Q. That they had countermanded theirs, and yours would not come? A. Yes, sir; that the oil would not come; that they had had to get a car load to get it at 14 cents."

In cross examination he was asked:

"And you understand the oil which you were given to countermand this order, was to be brought to you as you wanted it from that tank over there. A. Well, that was the agreement we had. Q. I mean the oil you were getting from these people was to come from over there? A. The oil from the Standard Oil Company? Q. Yes. A. I didn't hear where it came from; it was to be brought in the wagon and delivered at my store. Q. That was what you understood. A. I understood they were to deliver it to me as I wanted it. Q. And they did do it? A. Yes, sir."

He was further asked:

"Q. What was their reason for giving you this oil? A. Gave it to me to countermand the order, he said; just said I will give you fifty gallons to countermand the order. Q. To keep that oil from being brought here and sold by you in competition with other oil here? A. I presume so. Q. That was your understanding with them? A. That would naturally be my supposition, of course. Q. That was the supposition and understanding at the time? A. I guess it was."

Further along in the testimony, in answer to other questions he said he supposed it would destroy competition, and again "as a matter of course it would."

In re-examination he was asked:

"What was the understanding? A. That I was to countermand the order for the consideration of fifty gallons of oil. Q. Did you have any understanding with him in any way that this should be

done in order to affect the price of oil or reduce competition in oil at all. A. Nothing said about that. Q. Was there anything understood about that between you and him? A. No, sir; I don't suppose there was; there was nothing said about it. Q. Was there any agreement to that effect? A. No agreement between us; no we didn't say anything about conspiring with anybody or anything; that was all that was said; they didn't stay in my store five minutes; no longer than you could write out that agreement and sign it there."

The transaction with Mr. Cron was in substance this:

Mr. Holt called on Mr. Cron and asked him to cancel the order, because it would be to the interest of O'Donnell Rutherford, who lived at Gallatin, and was a home boy, and was working for the company, and ought to be encouraged &c. This failing to
749 move him, Mr. Holt offered him fifty gallons of oil to make the cancellation, or to countermand the order. Mr. Cron, however, had heard that Mr. Love had been promised one hundred gallons, and stood out for the same figure, and Mr. Holt finally yielded and agreed to give that number of gallons. Thereupon the telegram was sent by Mr. Holt in the name of Mr. Cron, countermanding the order. Mr. Cron says he was informed by Mr. Holt that Lane, Love and Hunter had countermanded their orders. He says that he did not make the agreement for the purpose of preventing competition, but admits that he knew that it would have that effect; also that he did not make the agreement with a view to the oil in storage at Gallatin, but he knew that large quantities were kept on storage there, and that "It was delivered right straight along after that."

The transaction with L. C. Hunter was simply that he was contemplating the countermand of the oil, in any event, because of a misrepresentation made to him by Mr. Rosemon, to the effect that some other merchants had purchased who had not in fact purchased. However, he had not decided upon the matter, but was considering it, when Mr. Holt came into his store (ten miles from Gallatin), and a conversation ensued between them. He told Mr. Holt that he had about decided to countermand the order, and Holt said: "Hunter I am going to give you fifty gallons of oil." Thereupon the telegram was written out and signed by Mr. Hunter, and was taken to Gallatin by Mr. Holt, and transmitted.

It is insisted that Mr. Comer did not authorize the giving of the oil to the merchants to induce them to countermand the orders, and that he knew nothing of the fact that oil had been so given until about the 23rd of December, 1903, when one S. P. Wilson informed him that he had just been told by James D. Whitesides, a former
750 resident of Gallatin, that the oil had been used in the manner stated; that he thereupon communicated, by telephone, with Rutherford, and the latter came down to Nashville, and confessed to the fact that the oil had been given away in the manner stated. It is testified by Wilson, and by Comer, that a shortage of three hundred gallons of the oil had been discovered, and that several letters had been written to Rutherford for an explanation, but they had not been replied to. Mr. Wilson testifies that on the 23rd of

December, when Mr. Comer called up Mr. Rutherford, that he, Comer, said that he had taken Rutherford sharply to task about the shortage and had told him that he was going to charge it up to him. Rutherford testifies that he had reported his inches on the first of December, and Rosemon testifies that on the sixth or seventh of December Rutherford told him that the shortage had then been charged to him. It is insisted by defendant that Rutherford and Holt made an agreement between themselves to keep it a secret from Mr. Comer, and Mr. Comer says he did not know it until the 23rd. Mr. Rutherford says that he did not tell Mr. Comer until the 23rd, and Mr. Holt that he did not confess it to Mr. Comer until the 24th or 25th of December.

An important fact in this particular connection is, that by the 23rd of December the occurrence had begun to be noticed in the press, particularly in a paper at Gallatin. In this paper the matter was discussed and a prosecution threatened against the company and all the parties concerned. The Nashville American had called up Mr. Comer for an interview. He declined to be interviewed, saying only that he did not sanction the giving away of the oil, but did not wish to discuss the matter in the newspapers. Mr. Holt testifies that Mr. Comer was greatly agitated. He says that he likewise was greatly agitated himself.

Truly, it would have been a very remarkable transaction if Mr. Holt had entered upon such a scheme on his own responsibility.

He and Mr. Rutherford say that Holt was to pay for the oil
751 himself; that is pay Mr. Rutherford so that he could account
for it to the company, and the use of the oil would never be
discovered; that they both agreed to say nothing about it. Yet, the
four merchants knew it, and they were not bound to secrecy, nor
asked even not to divulge it. Mr. Honeywell, one of the officers of
the Evansville Oil Company, arrived in Gallatin on the 1st of November when his Company's sixty barrels of oil reached there. He promptly called upon Mr. Love for an explanation of the countermand, and Mr. Love told him that the Standard Oil Company had written the telegram. At the same time, he called upon Mr. Cron, and Mr. Cron said that he told him how it was that the countermand was made. Mr. Cron does not mention the name of Mr. Honeywell, nor does Mr. Love, but from the testimony of Mr. Honeywell that he was the man who called and made inquiry, we are satisfied that it was to him statements were made. Mr. Comer says that Mr. Honeywell was in his office in December, and was talking about the countermand. We think he was mistaken about the date, and that it was in November. Mr. Honeywell identifies the date he was in Tennessee by the time of the arrival of his Company's oil at Gallatin. Mr. Rosemon testifies that on the sixth or seventh of December Mr. Rutherford told him about the gift of the oil. Mr. Rutherford admits they had a talk about the matter, but says that it arose from Mr. Rosemon's upbraiding him about giving away the oil to get his orders countermanded, and that he, Rutherford, replied, that he was not responsible for it, and had been charged with the oil. Mr. Rutherford testifies that Mr. Holt was his "boss," and he thought he

knew what he was doing. Mr. Holt testifies that he had no idea that he was violating the law at the time, and says that he thought that a man had a right to give away what belonged to him any
752 time he wished. It further appears that the amount of oil given away, according to current prices, aggregated \$40.50; while Mr. Holt's salary was only \$65.00 a month. It seems singular that he would give away two-thirds of a month's salary in such an enterprise. He offers the explanation that he thought, as he expressed it, that it would be a feather in his cap, and that he might get an increase of salary. He says further that he tried argument along the line that his company had superior facilities for delivery by tank wagons, in quantities as needed &c., and that O'Donnell Rutherford was a Gallatin boy, and that his home people ought to stand up for him, and finding this of no avail, then he offered to make the gifts of oil. It seems this is true as to Mr. Cron, so far as concerns the personal argument made in support of Rutherford, but not as to either of the others. Mr. Love testifies, as already stated, that Mr. Holt made him the plump proposition at the outset, to give him the hundred gallons of oil. Mr. Lane says the same thing in substance. Neither of these witnesses testify as to any argument or persuasion. We infer from the record that Love was the first man he approached.

There is another singular circumstance. It is this: As already stated, Mr. Holt testified that he was required to make a daily report so minute that it would contain almost everything he said. He made a report on the day he succeeded in getting the orders countermanded. The testimony shows that that report was made out in triplicate form; one copy was sent to Mr. Comer, one to Cincinnati, and the other was retained by himself. If it be conceded that the copy sent to Mr. Comer, and that sent to Cincinnati have both been lost or unintentionally mislaid, still it is developed that the copy retained by Mr. Holt was in his possession when the evidence was
753 taken, and it was not produced. The Court cannot do otherwise than to draw from this circumstance an inference unfavorable to the defendant, in respect of the contents of that paper.

Furthermore, Mr. Holt testifies that the defendant company appeared to appreciate what he had done at Gallatin; that is, that he had succeeded in getting the orders countermanded. And while the evidence is to the effect that Mr. Comer charged the oil, that is the three hundred gallons, to Mr. Rutherford, he urged Mr. Holt to pay the sum to Mr. Rutherford, and he did pay it; though he says he did so out of his own means, and not until May, 1903. It also appears that the defendant company kept Mr. Rutherford in its employ for nearly two years after the transactions above mentioned, that is after the giving away of the oil, and until he resigned on account of ill health, and that it kept Mr. Holt in its employ for nearly four years, using his services part of the time in Kentucky, part of the time in Huntsville, Alabama, and afterwards in Texas or the Indian Territory. It is true that Mr. Comer rebuked Mr. Holt, and also rebuked Mr. Rutherford, about the gifts of oil, but

at this time the occurrence had attracted adverse public attention and comment in the public press with threats of prosecution, and Mr. Comer was greatly agitated thereby.

After fully considering all of the circumstances we are constrained to believe that Mr. Comer sanctioned the acts of Mr. Holt immediately after they were done, if he did not in fact advise them before hand.

What was done was within the apparent scope of Mr. Comer's authority, since he was the general manager of the territory, and was charged with the marketing of the defendant's products therein.

As the result of the cancellation or countermanding of the orders referred to, competition in and around Gallatin was suppressed.

Shortly afterwards, that is within a week or two, the price of
754 defendant company's inferior oil was advanced from 13½ cents to 14½ cents per gallon.

It is true that the defendant's witness testifies that the prices it makes upon oil are fixed by Mr. Collings at the home office in Cincinnati, now in Covington, Kentucky, and that they depend upon the prices of the raw material or crude oil at primary points, and the rates of freight; that prices fluctuate through the year and that through a series of years, from 1903 to 1905, the defendant has reduced prices at Gallatin, as follows:

Jan. 1st, 1903, 14½ cents; April 28th, 1903, 14 cents; June 5, 1903, 13½ cents; Oct. 27th, 1903, 14½ cents; March 8th, 1904, 14 cents; May 24th, 1904, 13½ cents; Jan. 17, 1905, 13 cents; Feb. 22, 1905, 12½ cents; April 24th, 12 cents; June 15, 1906, 11½ cents; Aug. 18, 1906, 11 cents.

We think the facts make out a case against the defendant, falling clearly within, the authority of Holt's Case (Standard Oil Co. vs. State) 117 Tenn., 618.

In the case referred to it was held that corporations and their officers and agents who conceive and carry out a conspiracy can both be considered and counted in two or more necessary to constitute an unlawful conspiracy; that this is true under the Act on which the present litigation is based, and also on sound principle aside from the statute. 117 Tenn., 633 to 670, inclusive. On the page last referred to it is said:

"We are of the opinion that, independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents who engage in the conspiracy must be held to be parties to it, and *be* counted in computing the necessary number to constitute it."

755 Mr. Comer instructed Mr. Holt to go to Gallatin and have the orders countermanded. Mr. Holt agreed to go, and did go, and carry out the instruction. Here was an agreement between the corporation represented by Mr. Comer, and Mr. Holt a natural person to do the act. Mr. Holt proceeded to Gallatin and had conferences with Mr. Love, Mr. Lane, and Mr. Cron, in which they each agreed with Mr. Holt and Mr. Rutherford, representing the company, that they would cancel their several orders, and they accordingly did cancel them. Now aside even from the principle

above quoted from Holt's Case, here were unlawful agreements and arrangements entered into between the defendant company and certain natural persons, producing an unlawful combination; and the first section of the Statute not only covers unlawful combinations between natural persons among themselves and corporations among themselves, but, under a true construction, combinations between corporations and individuals.

A tendency of the agreements and arrangements above referred to, and we think the inevitable purpose, under a fair deduction from the evidence, was to lessen competition with the defendant's business at Gallatin in respect of the oil it had on storage there, and was offering for sale. It is immaterial that it would have the like effect upon oil which might thereafter be imported into Gallatin by the defendant, and poured into its storage tanks at that place. It is likewise immaterial that nothing was said between Love, Lane, Cron and Hunter on the one side, and Holt and Rutherford on the other, as to the purpose of the several arrangements entered into, or the tendency thereof. It appears from the testimony clearly of Love, Lane and Cron that they well knew what the purpose was, and the inevitable tendency. That Holt knew it goes without saying, since he went to Gallatin for the express purpose of endeavoring to suppress competition by shutting out the oil of the Evansville Oil Co. The inevitable tendency was to stifle competition as to the fifteen thousand gallons of oil then in the storage tanks, as
756 well as all the oil that might thereafter stand at rest in those tanks. Likewise it is true, in a broader sense, that the purpose and tendency of these arrangements was to protect the defendant's local business, at Gallatin.

We have found from the record that the means which were adopted, the gifts of oil, were either known before hand by the defendant, or really sanctioned afterwards, but we do not think this circumstance is essential as an element of the wrongful agreement. The unlawful agreements having been entered into, to have the orders countermanded, and to countermand the orders, it was not necessary that the special means for effecting the result should be agreed upon before hand. If the means employed were adapted to the purpose of carrying out the unlawful agreements entered into, and were used in execution thereof, they would be presumed to be within the contemplation of all concerned in such unlawful agreements.

It is said in the brief of counsel that it is wholly unreasonable to suppose that Love and the other persons at Gallatin who accepted oil, would have agreed for the consideration mentioned to assist the Standard Oil Company in suppressing competition, and thereby giving to that company a monopoly which could be used against them to control prices at will. It would seem strange if we did not know that men everywhere are constantly, for small present considerations, sacrificing the hopes and promises and rewards of the future. It was certainly an absurd thing for them to do, but that they did it, we think the record most clearly shows.

Particular reference is made to the table of prices above referred

757 to, showing that oil fluctuated at Gallatin both before and after the advent of the Evansville Oil Company, and that through a course of years thereafter it actually declined. This is true. However, the fact is not hereby removed that the unlawful agreements referred to had a tendency to lessen competition, and to increase the price of oil.

It is said that while the securing of countermands is not a proper way to conduct business, yet under the custom of trade, a merchant has the right to countermand an order, and hence there is nothing unlawful in making such countermands. There is evidence of such a custom in the record, and if the merchants referred to had made those countermands for their own purposes, unmoved by combination or agreement with a third party, in this case the defendant company and Holt and Rutherford, there would have been no ground of action.

"The difference is legal contemplation, between individual right and combined action in trade," and the Court in *Bailey vs. Master Plumbers*, "is seen in numerous cases.

"Any one of several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet, an agreement between all of them to make no sale for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade.' *India Bagging Association vs. Koch*, 14 La. Ann., 164. Any one of several companies had the right to sell the whole or only a part of its output to only such persons, and only such territory, and at only such prices as it pleased, yet it was inimical to the interests of the public and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose. *Arnot vs. P. & E. Coal Co.*, 68 N. Y., 558; *Morris Run Coal Co. vs. Barkelley Coal Co.*, 68 Pa., 173. The same was held to be true, as to the individual company and the combined company respectively in the Sugar Trust Case, previously cited, 2 L. R. A., 33, and 5 L. R. A., 386.

758 "So one railroad company has the unquestioned right to charge reasonable rates for transportation, but it is not lawful for competing companies to mutually bind themselves to maintain those rates. *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290; *United States vs. Joint Traffic Association*, 171 U. S., 505. Individual boat proprietors may establish rules and rates for the conduct of their separate business, but the law does not allow them to form a combination, and, by mutual agreement, establish joint rules and rates. *Hooker vs. Vandewater*, 4 Denio, 349; *Stanton vs. Allen*, 5 Denio, 434. One grain dealer is perfectly free to decide for himself what price he will offer for grain, but he is not allowed to enter into an agreement with the other grain dealers of his town, and thereby fix the price that all of them shall offer. *Craft vs. McComough*, 79 Ill., 346.

A single brewer may fix his own price for the beer he sells. Nevertheless it is unlawful for an association of brewers to regulate the sales of its members. *Nester vs. The Continental Brewing Co.*, 161 Pa., 473." 113 Tenn., 118, 119.

We do not think that it is material that the evidence fails to show that Love, Lane, Cron and Hunter, united in a single agreement with the defendant, and Holt and Rutherford, to do what was done. It was sufficient that either one of these purchasers from the Evansville Oil Co., combined or agreed with the defendant company to do the act, which was in violation of the statute. Holt's case, *supra*.

On the grounds stated, and for the reasons given, we are of opinion that there was no error in the decree of the Chancellor, and it must be affirmed.

NEIL, *Judge*.

759-779 STATE OF TENNESSEE:

Be it remembered, that at a Supreme Court of Errors and Appeals, begun and held at the Capitol, in the City of Nashville, on the first Monday in December, 1907, it being the second day of December, 1907, neither Judge attending, I adjourned Court until to-morrow morning at 9 o'clock.

JOE J. ROACH, *Clerk*.

The Clerk adjourned Court from day to day until Monday, December 9, 1907.

MONDAY, December 9, 1907.

Court met pursuant to adjournment—present, Honorable Associate Justices W. K. McAlister, M. M. Neil, Jno. K. Shields, and Honorable Special Justice J. H. Henderson—when the following proceedings were had, to wit:

APRIL 11, 1908.

STATE OF TENNESSEE *ex Rel.* ATTORNEY GENERAL
vs.

STANDARD OIL COMPANY OF KENTUCKY.

Affirmed.

Be it remembered that this cause came on to be heard on this the — day of April 1908, before the Honorable the Judges of the Supreme Court of the State of Tennessee, upon the transcript of the record from the Chancery Court of Sumner County, the assignments of error filed on behalf of the complainant and defendant, both of whom were appellants, and argument of counsel having been heard, and the Court being of the opinion that the assignments of error filed on behalf of the defendants, Standard Oil Company, are not well taken, the same are therefore overruled; and the Court being of the opinion that there is no error in the decree of the Chancery Court of Sumner County, the same is therefore in all things affirmed.

Therefore it appearing to the Court that the allegations of the original bill are sustained by the proof and that the defendants Standard Oil Company and its agents, Comer, Holt and Rutherford, and S. W. Love, W. H. Lane, J. C. Cron, and L. C. Hunter, as alleged in said bill, unlawfully entered into an arrangement and agreement for the purpose and with the view of lessening full and free competition in the sale of defendants' oil at Gallatin, and that such

unlawful agreements and arrangements tended to and resulted in lessening and destroying full and free competition in the sale of defendants' oil at Gallatin, and tended to and resulted in advancing the price of said oil to defendants' customers at Gallatin; and
 780 it further appearing that the defendant, Standard Oil Company, in entering into said unlawful arrangements and agreements violated the provisions of Section 1 of Chapter 140 of the Acts of 1903, and subjected itself to the penalty prescribed by Section 2 of said Act, applying to foreign corporations—it is accordingly so ordered, adjudged and decreed.

And thereupon the Court doth further order, adjudge and decree that the defendant Standard Oil Company, a foreign corporation, chartered and organized under the laws of the State of Kentucky, be and hereby is denied the right to do and prohibited from doing business within this State, and its license or permit to do business within this State, issued on the 21st day of September 1893, by the Secretary of State, be and hereby is cancelled and annulled, and said defendant Standard Oil Company, its managers, agents, servants and attorneys, are hereby perpetually enjoined and restrained from doing or carrying on business within this State; but nothing herein shall be construed to in any way affect or apply to defendant's interstate commerce, or to prohibit it from engaging in interstate commerce within this State.

The defendant Standard Oil Company, and Jno. J. Vertrees, its surety on prosecution bond, will pay all the costs of this Court for which execution may issue. The costs of the Court below will be paid as adjudged by the Chancellor.

The opinion of the Court is herewith filed and made a part of the record.

Thereupon the defendant Standard Oil Co. filed its petition for a re-hearing, which, after due consideration by the Court, is overruled and disallowed.

Thereupon the defendant Standard Oil Company, by and through its counsel gave notice in open Court that it would apply to the Chief Justice of this Court for a writ of error to this
 781 Court from the Supreme Court of the U. S. to operate as a supersedeas.

782 April 11, 1908. Joe J. Roach, Clerk.

Supreme Court of Tennessee. December Term, 1907.

Sumner. Equity.

STATE OF TENNESSEE *ex Rel.*, etc.,

vs.

STANDARD OIL COMPANY.

To the Honorable the Judges of the Supreme Court of Tennessee:

Petitioner the Standard Oil Company defendant in this cause respectfully says that it is aggrieved by the decree rendered in this cause on the 11th day of April 1908 and that there is error therein,

and for that reason respectfully asks that the decree be set aside and a re-hearing be granted.

The Court erred in these respects, namely:

1. In holding and decreeing that the defendant forasmuch as it is a corporation is not entitled to be tried by a jury for the alleged violation of an Anti-trust Act.

2. In holding and decreeing that no statute of limitations was or can be pleaded by the defendant in this case.

3. In holding and decreeing that the alleged offense is not an offense against the laws of Congress if an offense at all.

4. In holding and decreeing that the Act which is Chapter 140 of the Acts of 1903 is not void for that it is a regulation of inter-state commerce.

5. In not holding and decreeing that said Act is void because it denies to the defendant the equal protection of the laws secured by the 14th Amendment.

6. In holding and decreeing that said Act does not deprive this defendant of property or rights without due process of law.

7. In holding that the evidence as to the report of C. E. Holt was rightfully excluded.

8. In holding that the evidence as to the letters between Mr. Collings and Mr. Comer were not sufficient to admit of the introduction of the copies thereof.

9. In not holding that the evidence of Holt, Comer, Collings and Rutherford and Wilson respectively as to the facts that this transaction at Gallatin was not known to any managing officer of the Company, but concealed from such officers was evidence of a distinctive fact admissible and competent in itself.

10. In finding as a fact that there was any offense committed.

11. In holding that a criminal conspiracy or agreement was entered into between the corporation and Holt when Mr. Comer directed Mr. Holt to go to Gallatin and secure a countermand of the orders.

JOHN J. VERTREES,

Sol. for Defendant.

784 Filed April 11th, 1908. Joe J. Roach, Clerk.

Supreme Court of Tennessee. December Term, 1908.

STATE OF TENNESSEE *ex Rel.* ETC.,

vs.

STANDARD OIL COMPANY.

In Equity.

To the Honorable W. D. Beard, Chief Justice of the Supreme Court of Tennessee:

The petition of the Standard Oil Company of Ky.

Your petitioner hereby respectfully sets forth and shows that on the 11th day of April, 1908, the Supreme Court of the State of

Tennessee sitting at Nashville, Tennessee, made and entered a final order and judgment in the above entitled case in favor of the complainant and against your petitioner in which final order and decree, and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of your petitioner, the Standard Oil Company, all of which appear in detail from the assignment of errors filed in this cause with this petition; and

That the said Supreme Court of the State of Tennessee is the highest Court of the said State of Tennessee in which a decision in this suit and this matter could be had; and

That this suit or cause is one in which the Attorney General of the State of Tennessee, proceeding in the name of the State of Tennessee, as complainant, upon the relation as Attorney General, sought to oust this defendant, a corporation organized under the laws of Kentucky, and doing business in the State of Tennessee, from the State and to prevent and restrain it from further doing business

785 therein upon the ground that two certain transactions complained of and set forth in the bill, were agreements or understandings, or conspiracies, or combinations in restraint of trade and for that reason in violation of a certain statute of Tennessee known as Chapter 140 of the printed Acts of said State for 1903. A final judgment or decree was rendered therein, as above stated, forbidding and restraining your petitioner from further doing business as it had theretofore done in said State, and from doing any business whatsoever therein, save and except business purely of an inter-state character. This judgment or decree, your petitioner avers and shows, was erroneous, as shown by, and upon the grounds stated in the assignment of errors filed herewith.

Wherefore, your petitioner, the Standard Oil Company (of Kentucky), prays that a writ of error from the Supreme Court of the United States may issue in its behalf to the Supreme Court of Tennessee for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States. This the 11th day of April, A. D. 1908.

STANDARD OIL COMPANY.

JOHN J. VERTREES,

Counsel for the Petitioner, the Standard Oil Co.

786 Filed April 11, 1908. Joe. J. Roach, Clerk.

Supreme Court of the State of Tennessee.

STATE OF TENNESSEE, upon Relation of, etc.,

vs.

STANDARD OIL COMPANY.

Now comes the plaintiff in error, the Standard Oil Company (of Kentucky), and respectfully submits that in the record, proceedings, decision and final decree of the Supreme Court of Tennessee, in the above entitled matter, or case, there is manifest error in this, namely:

First. The Court erred in finding and decreeing that the transactions at Gallatin, Tennessee, between Holt and Rutherford, Agents of this petitioner Company, or either of them, and four merchants at Gallatin, Tennessee, in the bill mentioned, or any of them, constituted a combination, conspiracy, or agreement or understanding forbidden by the statute, which is chapter 140 of the Acts of the General Assembly of the State of Tennessee for the year 1903.

Second. In not adjudging and decreeing that said transactions, if an offense against, or violation of, any law, were, and are, an offense against, and violation of, the laws of the United States relating to inter-state commerce, and not an offense against, or violation of, the laws of the State of Tennessee.

Third. In holding and decreeing that the contract in the pleadings mentioned between the Cassety Oil Company and the Standard Oil Company constituted no combination, conspiracy, or agreement forbidden by the Act passed by the General Assembly of Tennessee, which is chapter 140 of the General Laws of Tennessee for 1903.

787 *Fourth.* In not adjudging and decreeing that the said contract between the Cassety Oil Company and the Standard Oil Company, if it be an offense against, or violation of any law, was an offense against, and violation of the laws of the United States relating to interstate commerce, and not an offense against, or violation of the laws of the State of Tennessee, and particularly of the said Act, Chapter 140, hereinbefore mentioned.

Fifth. In not holding and decreeing that the said Act, Chapter 140 of the Acts or General laws of the State of Tennessee for the year 1903, having been adjudged to relate and apply to the said transactions at Gallatin, and the contract at Nashville with the Cassety Oil Company, is void as a regulation of inter-state commerce in that it is in violation of Article 1, Section 8, sub-section 3 of the Constitution of the United States.

Sixth. In adjudging and decreeing that the Act passed by the Legislature of Tennessee, known as Chapter 140 of the Acts or General Laws of 1903, and which it is decreed this petitioner, the Standard Oil Company (of Kentucky), has violated, is valid, and does not deprive it of its rights, liberty or property without due process of law, nor deny to it the equal protection of the laws.

Seventh. In not adjudging and decreeing that the said Act, Chapter 140 of the Acts of 1903, of the Legislature of Tennessee, is void, for that it is in violation of the XIVth amendment to the Constitution of the United States, in that it deprives the petitioner of its rights, liberty and property, without due process of law, and denies to it the equal protection of the law.

Eighth. In holding and decreeing that the transactions complained of in the bill at Gallatin, Tennessee, and at Nashville, Tennessee, and alleged to be illegal, constitute an offense against
788 the laws of the State of Tennessee, and in not holding that they were transactions of interstate commerce beyond the power of the State of Tennessee to regulate, and exclusively under the power, or regulation of the congress.

Ninth. In not dismissing the bill of complaint, original and amended.

Tenth. In not holding and decreeing that the said Act which is Chapter 140 of the General laws of the State of Tennessee for the year 1903, deprives this defendant, the Standard Oil Company, a corporation organized under the laws of Kentucky, of its rights, liberty and property, without due process of law, and denies to it the equal protection of the law in these respects, namely:

(a) It arbitrarily and capriciously denies to the defendant, a foreign corporation, the right to a trial by jury, for a violation of its provisions.

(b) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions the right of trial by jury, granted to natural persons, charged with violating its provisions.

(c) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions, a trial according to the laws of the land for the trial of criminal charges whereby the defense of the statute of limitations can be pleaded and relied upon, while it grants the same to natural persons charged with violating its provisions.

(d) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions a trial according to the procedure prescribed by the laws of the land for the trial of criminal charges, whereby the guilt of the party charged must be established beyond a reasonable doubt in order to convict, and

789 obliges the corporation to answer and defend in a procedure whereby it may be convicted upon a mere preponderance of the evidence, or upon less evidence than such as is required to establish guilt beyond a reasonable doubt, when it grants to natural persons charged with its violation, the right to be tried according to that procedure proscribed by the laws of the land under which the accused must be proven guilty beyond a reasonable doubt, in order to convict.

JOHN J. VERTREES,
Counsel for Standard Oil Company.

790 Filed April 11, 1908. Joe J. Roach, Clerk.

Supre- Court of Tennessee, December Term, 1908.

STATE OF TENNESSEE *ex Rel.*, etc.,

vs.

STANDARD OIL COMPANY.

Know all men by these presents, that we, the Standard Oil Company (of Kentucky) as principal, and American Surety Co. of New York as surety, are held and firmly bound unto the State of Tennessee in the sum of One Thousand Dollars to be paid to the said obligee, its representatives or assigns, for the payment of which, well and truly to be made, we bind ourselves and representatives

jointly and severally by these presents, sealed with our seals, and dated this the 11th day of April, A. D. 1908.

Whereas, the above named plaintiff in error, the Standard Oil Company, has prosecuted a writ of error in the Supreme Court of the United States to reverse the decree rendered in the above entitled action by the Supreme Court of the State of Tennessee;

Now therefore, the condition of this application is such that if the above named plaintiff in error, the Standard Oil Company shall prosecute its said writ of error with effect and answer all costs and damages if it shall fail to make good its plea, then this *application* shall be void, otherwise to remain in full force and effect.

STANDARD OIL COMPANY,

By JNO. J. VERTREES, *Attorney*.

AMERICAN SURETY COMPANY OF
NEW YORK,

By JAS. B. MCKEE, *Vice President*

JEFFERSON McCARN, *Res. Ass't Sec'y*.

Affirmed,

BEARD, C. J.

791 Filed April 11, 1908. Joe J. Roach, Clerk.

Extract from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 20th day of March, 1907.

"The following resolution was adopted:

"Resolved, That James B. McKee, of Nashville, Tenn., be and he is hereby constituted and appointed a Resident Vice-President of this Company at the town or city, aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of a Resident Assistant Secretary of this Company."

STATE OF NEW YORK, *County of New York*, ss:

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the company, at the City of New York, this 20th day of March, 1907.

[SEAL.]

F. J. PARRY,
Assistant Secretary.

793 Filed April 11, 1908. Joe J. Roach, Clerk.

Extract from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 13th day of March, 1907.

"The following resolution was adopted:

Resolved, That Jefferson McCarn, of Nashville, Tenn., be and he is hereby constituted and appointed a Resident Assistant Secretary of this company at the town or city, aforesaid, with full power and authority to attest any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this company affixed thereto, and to be executed on behalf of this company by one of its Resident Vice Presidents."

STATE OF NEW YORK, *County of New York:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 20th day of Mar. 07.

794 F. J. PARRY,
Assistant Secretary.

Filed April 11, 1908. Joe J. Roach, Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable, the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Tennessee before you, being the highest Court of law or

equity of the said State in which a decision could be had in the said suit between the State of Tennessee upon the relation of Charles T. Cates, Jr., Attorney General of the State of Tennessee, the complainant and the Standard Oil Company of Kentucky, defendant, wherein **was drawn the question**, the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the constitution and laws of the United States, and the decision was in favor of such, their validity, a manifest error has happened to the great damage of the said Standard Oil Company as by its complaint appears, we being willing that error, if any has been done, shall be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in Washington in the District
795 of Columbia on the first Monday in October, 1908, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 11th day of April, in the year of our Lord, 1908.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the U. S.

Allowed by

W. D. BEARD,

Chief Justice of the Supreme Court of Tennessee.

796 Filed April 11, 1908. Joe J. Roach, Clerk.

United States of America to the State of Tennessee and Chas. T. Cates, Jr., Attorney General of the State of Tennessee, Greeting:

You are hereby cited to be and appear in the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the State of Tennessee, wherein the State of Tennessee upon the relation of Chas. T. Cates, Jr., Attorney General, is complainant and the Standard Oil Company is defendant (now complainant in error), to show cause, if any there be, why the decree rendered against the said Standard Oil Company, as in the said writ of error mentioned, should not be — done to the parties in that behalf.

Witness the Honorable W. D. Beard, Chief Justice of the Supreme Court of Tennessee, this the 11th day of April, in the Year of our Lord, one thousand, nine hundred and eight.

W. D. BEARD,

*Chief Justice of the Supreme Court of the
State of Tennessee.*

Copy of this citation received this the 11th day of April, 1908.

CHARLES T. CATES, JR.,
Attorney General.

797 Filed April 11th, 1908. Joe J. Roach, Clerk.

Supreme Court of Tennessee, December Term, 1908.

STATE OF TENNESSEE *ex Rel.*, etc.,

vs.

STANDARD OIL COMPANY.

The above entitled cause coming on to be heard upon the petition, assignment of errors, bond, etc., of the appellant the Standard Oil Company (of Kentucky), for a writ of error from the Supreme Court of the State of Tennessee, and upon examination of said petition, and the examination of the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in said matter—

It is ordered that a writ of error be, and is hereby allowed to this Court from the Supreme Court of the United States, and that the bond presented by the said petitioner be, and that the same is hereby approved, and that it operate as a supersedeas in this cause.

W. D. BEARD,
Chief Justice.

798 To the Sheriff of ——— County, Greeting:

You are hereby commanded, that of the goods and chattels, lands and tenements of ——— if to be found in your County, you cause to be made the sum of — dollars debt, together with interest from the — day of — 190—, at — per cent., and — costs, the fees hereon endorsed, which — lately in our Supreme Court, at Nashville, recovered against said ——— for debt, damage, and costs, whereof — convict and liable, as appears to us of record, and have you the same before the said Court, on the first Monday of ——— next, ready to render to the parties entitled thereto. Herein fail not, and have you then and there this writ, and make your return how you have executed the same.

Witness, Joe J. Roach, Clerk of said Supreme Court, at office in Nashville, the first Monday of December, 190—.

By ———, *Clerk*,
By ———, *D. C.*

Judgment — day of — 190—, for —.

Bill of Costs.

State Tax in Supreme Court.....	\$5 00
State Tax in Court Below.....

Clerk—Roach:

Filing Record, 75 cts.; Entering on Seven Dockets, \$1.75; Redocketing — times — cts.; Continuances — cts.; Judgment, 75 cts.; Judgment against — Sureties 25 cts.; Judgment for Costs, 25 cts.; Entering Supreme Court Costs on Execution Docket, 50 cts.; Entering Costs of Inferior Court on Execution Docket, 50 cts.; Entering Supreme Court Costs on Execution, 50 cts.; Endorsing Inferior Court Costs on Execution, 50 cts.; Correcting Bill of Costs of Inferior Court, 50 cts.; Order 1" cts.; Entering Sheriff's Return, 25 cts.; Recording — Receipts 50 cts.; Certiorari — cts.; Order — cts.; <i>Sci. Fa.</i> — cts.; Filing Petition — cts.; Writs of Error — cts.; Writs of Certiorari and Supersedeas — cts.; Taking and Filing Bond — cts.; Entering — Sureties of Record — cts.; Motion — cts.; Notice — cts.; Filing Petition to Rehear — cts.; Filing Answer to Petition — cts.; Order — cts.; Filing Additional Record — cts.; Rules — cts.; <i>Fi. Fa.</i> , \$1.50; Alias, <i>Fi. Fa.</i> and Copy costs — cts.; Postage, 10 cts.; <i>Pluries Fi. Fa.</i> and Copy Costs — cts.; <i>Procedendo</i> — cts.; Seal — cts.; Copy Opinion accompanying, \$—; Seal — cts.; Copy of Judgment accompanying — cts.; Seal — cts.; Filing 3 Briefs 1.50 cts.; Enrollment — cts.; Filing — Exhibits — cts.; Filing opinion 50 cts.; Affidavits — cts.; Packing and Sending Record — times 50 cts.; Notice to Counsel 1" cts.; Qual. Sureties — cts.; Sug. Dem. — cts.; Judgment Over — cts.; Writ of Possession — cts.; Retax Cost — cts. . . .	13 10
	18 10

In the Chancery Court of Summer County.

County Tax.

Clerk & M. J. D. G. Morton Rec. & Flg. Rec. .25 Aff. to bill .25 Flg. Aff. to bill .25 Spa. to Ans. .75 Copy bill 3" Flg. Ans. & Dem. .50 Flg. Amd. bill & Ans. .50 Flg. bill .25 Ex. 6 Dep 6" Flg. 19 Dep. 1.90 Flg. 4 Stip. 1" Flg. 11 Ex. 2.75 Ex. .25 44 Rules 4.40 3 Ords. 1.50 Dec. 1" 6 Dks. .60 Flg. & Rec. Apl. Bd. .50 Secty. .25 Cost & Ent. .50 Trans. 150.00 Post. 2 Bind 5" cut & seal .50	183 90
N. P. Buford Duke 13 Dep. 13" Shff. F. E. Patton Ex. spa. to Ans. 1.	14
Wit. O. T. Reynolds 1 da. 150 mi.	9

225 00

Transcript of record \$250.00.

Paid by Jno. J. Vertrees, Att'y for Standard Oil Co.

799 STATE OF TENNESSEE, *Middle Division*:

I, Joe J. Roach, Clerk of the Supreme Court of Tennessee for the Middle Division of Tennessee, do hereby certify that the foregoing is a true, perfect and complete transcript of the record in the case of the State of Tennessee *Ex. Rel.* Chas. T. Cates Attorney General *vs.* Standard Oil Company of Kentucky as the same appears and is now on file in my office at the Capitol in Nashville Davidson County, Tennessee.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at office, in the Capitol at Nashville, Tennessee, on this, the 5th day of May, 1908.

[Seal Supreme Court, Nashville.]

JOE J. ROACH,
Supreme Court Clerk.

Endorsed on cover: File No. 21,168. Tennessee supreme court. Term No. 391. Standard Oil Company of Kentucky, plaintiff in error, *vs.* The State of Tennessee upon the relation of Charles T. Cates, Jr., attorney general of the State of Tennessee. Filed May 11th, 1908. File No. 21,168.

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Supreme Court of the United States

DECEMBER TERM, 1908.

Standard Oil Company (of Kentucky)

vs.

State of Tennessee, *ex relatione, etc.*

In error to the Supreme Court of Tennessee.

May it please the Court:

This case is now before the Court upon the motion of the Defendant in Error to *dismiss* the writ of error because “no *real* Federal question exists, or is involved;” or if that motion be disallowed, to *affirm* the decree of the Supreme Court of Tennessee, on the ground that the writ of error “was taken for delay only, and that the question on which the jurisdiction depends is so *frivolous* as not to need further argument.”

The case is a proceeding to *punish* the Plaintiff in Error (hereinafter called the Defendant) as a foreign corpora-

tion, for an alleged violation of the Tennessee Anti-Trust law.

The Attorney General of Tennessee filed a bill in the name of the State, upon his relation, in a Chancery Court of Tennessee, to stop the Defendant from doing business in, and to oust it from, the State, on the ground that it had engaged in a conspiracy or combination in restraint of trade, in violation of the State Anti-Trust law.

There was a decree of ouster. The Defendant appealed to the Supreme Court of the State; and the decree was affirmed.

Thereupon, the Defendant sued out this writ of error in this Court. The transcript of the record was filed May 11, 1908.

March 12, 1909, the Attorney General of the State gave notice that he would make this motion to dismiss or affirm, on the 12th day of April, 1909, on the grounds above stated.

As will be observed, the motion is not based upon any formal or technical ground, but upon the merits. The motion proceeds upon the ground that "no real Federal question is involved," and that if there be, it is so *frivolous* as "not to need any further argument."

Necessarily such a motion requires a full statement of the case, and presentation of the questions involved, and of the arguments which support them.

Indeed, the Attorney General has found it necessary, in order to show to his own satisfaction that the question is *frivolous*, to file a brief over sixty pages long.

Two Federal questions are involved, and relied upon by the Defendant. One arises under the Interstate Commerce clause of the Federal Constitution, and the other under the Fourteenth Amendment. They were both made by the Defendant in its first pleading, and in the assignment of errors in the State Court, and in its petition for a rehearing, and in the assignment of errors, filed with its petition for a writ of error. They were both considered, and decided adversely to the Defendant, by the Supreme Court of Tennessee.¹ *If either question be well taken, it is fatal to the State's case.*

The statement of the case which appears in the Attorney General's brief is deemed in some respects inaccurate, and it omits certain facts which, as we believe, ought to be brought to the attention of the Court. For that reason we make the following

¹Trans., 387, 511, 540, 542, 22.

STATEMENTS OF THE CASE.

1. *General Statement.*—The original bill was filed on the 16th day of March, 1907. It charged that a certain *transaction* which had taken place at *Gallatin*, in Sumner County, Tennessee, on the 12th day of October, 1903, was a combination, or agreement, or conspiracy, against trade, and a violation of the State Anti-Trust Act.

An *amended* bill was filed on the 14th day of November, 1907. It charged that a certain *contract* entered into between the Plaintiff in Error (hereinafter called the Defendant) and the Cassety Oil Company of Tennessee, on the 30th day of October, 1899, but which *expired* October 30, 1904, was also a conspiracy, or combination, or agreement against trade in violation of the State Anti-Trust law.

A demurrer to the *amended* bill was sustained by the Chancellor, and that bill was *dismissed*.² On the appeal, it was said by the Supreme Court of Tennessee, in the *opinion*, that under the view that the Court took of the case, it was not necessary to *discuss* the action of the Chancellor on the amended bill.³ The Court, nevertheless, *decreed and adjudged* that the decree of the Chancellor should be in all things *affirmed*,⁴ thereby affirming the de-

²Record, p. 360.

³Record, p. 499.

⁴Record, p. 540.

decree of the Chancellor sustaining the demurrer and dismissing the amended bill.

While the contract with the Cassety Oil Company was made in *Ohio*, and not in Tennessee,⁵ and was a mere contract of *agency*⁶ which violated no law, State or Federal,⁷ and entered into, when advised by counsel in Ohio that it was entirely legal,⁸ in view of the decree of the Supreme Court *affirming* the decree of the Chancellor with respect to the *amended bill*, and no complaint or writ of error by the State of Tennessee, the questions presented by the amended bill, are eliminated and not up for review here. The *only* transaction remaining to be considered in the present proceeding, is that which took place at *Gallatin* on the 12th day of October, 1903.

The Defendant, the Standard Oil Company (of Kentucky) has been doing business in Tennessee for more than twenty years. The first statute imposing *conditions* of admission upon foreign corporations of the character of Defendant, was passed in 1893, at which time the Company was *already* doing business in the State. It complied with that statute, and filed a copy of its charter, as required,

⁵Record, questions 109-113, p. 183.

⁶Record, pp. 329, 330.

⁷*Walter A. Wood M. & R. Machine Co. v. Greenwood Hardware Co.*, 75 S. C., 378; *Kevil v. The Standard Oil Co.*, 9 L. R. A. (N. S.), 449, note; (Ohio).

⁸Record, p. 186, Ques. 147-48; p. 184, Ques. 123.

in the office of the Secretary of State, on the 21st day of September, 1893, and obtained a license or permit to do business; and it has done business in Tennessee under that license ever since.⁹

The Anti-Trust Act, which it is charged was violated, was passed on the 23d day of March, 1903—nearly ten years *after* the Company had been doing business in the State. The transaction, alleged to be a criminal violation of the Anti-Trust Act, occurred on the 12th day of October, 1903.

The present bill to oust the Company for that alleged transgression, was filed on the 16th day of March, 1907—nearly three and one-half years *after* the offense had been committed.

The foregoing general statement is made to enable the Court to more readily follow this more

2. *Detailed Statement.*—The bill admits that the Appellant has claimed the right to do, and has been doing, business in Tennessee since the 21st day of September, 1893.¹

Certain Acts were passed by the Legislature of the State² making it unlawful for a *foreign* corporation to do business in Tennessee, without first filing an authenticated copy of its charter with the Secretary of State. The bill

⁹Record, p. 1.

¹Record, p. 1.

²Acts 1891, Chap. 122; 1895, Chap. 81.

concedes that the Defendant complied with these requirements, on the 21st day of September, 1893.³

We understand the Attorney General to contend in his *brief* that the Defendant is to be regarded as a *domestic* corporation,⁴ by reason of the Acts of Tennessee known as Acts 1891, Chap. 122, and Acts of 1877, Chap. 31. Why he should do this when the *bill* proceeds against it as a *foreign corporation*, and when no advantage is gained by that view, we are not able to perceive. But be that as it may, it is settled that the Acts referred to do *not* have the effect to make foreign corporations complying with these requirements, domestic ones.⁵

The Company has built up a great business in Kentucky, Tennessee, Mississippi, Louisiana, Alabama, Georgia and Florida.⁶

The Company has been a success. That success in a great measure is due to its *system of doing business*—the

³Record, p. 1.

⁴Brief, pp. 44, 41.

⁵*Markwood v. South. Ry. Co.*, 65 Fed. Rep., 817, Cir. Ct. East Dist. Tenn.; *Hollingsworth v. Southern Ry. Co.*, 86 Fed. Rep., 353; *St. Louis, etc., Ry. Co., v. James*, 161 U. S., 545, 562-63.

⁶Record, p. 315.

system of *tank*-distribution and delivery. Its oil is transported in *bulk* from the refineries in iron tank cars, to the Company's "bulk stations." These are stations established on railway lines in the cities and principal towns, and at which the Company has stationary iron tanks, into which the oil is transferred *in bulk*, from the tank cars, without expense, by gravity. "Tank wagons" are kept at these "bulk stations" to distribute the oil to the Company's customers. These tank wagons are iron tanks permanently mounted on wagons, and they go out into the country from the stations as far as *twenty-five miles*.⁷

In some parts of the country the roads get bad in wet weather, rendering it impossible for the heavy tank wagons to go out. The Company under such conditions sends out oil in ten-gallon (milk) cans, by ordinary light vehicles, so as to supply its trade.⁸

That part of the country in which the Company does business is divided up into "districts" under the immediate control of agents, known as "Special Agents." Sub-agents are in charge of the bulk stations, and they are known as "Local Agents." In 1903, the special agent in charge of Middle Tennessee was *Mr. C. E. Coner*, with his office at Nashville. The local agent at Gallatin was *O'Donnell Rutherford*, and Gallatin was in the Nashville district.

"Drivers" have charge of the tank wagons and deliver

⁷Record, Ques. 115, p. 196.

⁸Record, Ques. 35, p. 348.

oil therefrom to customers. "Inspectors" and traveling "salesmen" go over the districts from time to time. *Mr. C. E. Holt* was a traveling salesman in the Nashville district, with headquarters at Nashville.

No oil is sold from the wagons to consumers. They sell and deliver to merchants and dealers only.⁹

The Company has bulk stations in forty-nine counties in Tennessee. Seventy-nine tank wagons operate from these stations as bases of supplies.¹⁰

The Company also has seven "barrel stations" in Tennessee—that is, stations from which oil is sent out in barrels only.¹

Its stations have cost \$166,000. Its teams, tank wagons, etc., are worth \$30,000. It pays annually as license fees and taxes over \$10,000, and it pays inspection fees amounting to about \$40,000 per annum.²

This system was not built up in a day, nor in a year, but through years. Its advantages are obvious. The merchant can get oil when he wants it, and as he wants it. There are no long "delays" in shipments. The small merchant is not obliged to order a carload, nor to "club" with others (even when he can do so) in order to get the advan-

⁹Record, p. 192.

¹⁰Record, pp. 193, 194.

¹Record, p. 194.

²Record, p. 195.

tage of carload lots. The Company will deliver any quantity from twenty gallons up as desired. The oil is delivered at the merchant's door, and measured before his eyes. This means full measure. There is no leakage and evaporation, as is the case when barrels are used; no loss in shipment, no leakage while stored. There are no drayage and cartage charges.³ The system is one that, by reason of its convenience, "absorbs the business."⁴

This thoroughly organized system gives the Defendant Company an advantage over its competitors. *They* now appreciate it, and have begun to adopt the same system themselves. Some of them have introduced the bulk-station and tank-wagon system into the four cities of Tennessee, *but have not yet extended it to the towns.*⁵

The price of oil has varied, of course, but under the Company's system, *prices have been gradually and steadily reduced.*

Tables showing the price of oil at all times from January 1, 1903, to July 6, 1907 (when the tables were made out), at fifty-six of the principal cities and towns of Tennessee, are in the record, and they show how prices have been reduced, and this, too, in a State in which it is *charged* that the Company had "pre-empted" the oil market, and at

³Record, pp. 195, 196.

⁴McIlwaine, q. 50, p. 178.

⁵Record, pp. 194, 195.

many places where the company has had no competition for years.⁶

The prices of oil, delivered from tank wagons, at Gallatin (where the "conspiracy" existed) have been as follows:

GALLATIN TANK-WAGON DELIVERY.⁷

1903.	January 1	14½	cents per gallon.
1903.	April 28	14	cents per gallon.
1903.	June 5	13½	cents per gallon.
1903.	October 27	14½	cents per gallon.
1904.	March 8	14	cents per gallon.
1904.	May 24	13½	cents per gallon.
1905.	January 17	13	cents per gallon.
1905.	February 22	12½	cents per gallon.
1905.	April 24	12	cents per gallon.
1906.	June 15	11½	cents per gallon.
1906.	August 18	11	cents per gallon.
1907.	July 5	11	cents per gallon.

The dates above given are the dates at which changes in price took place. The prices remained the same between dates as fixed at the last preceding date.⁸

This was the situation, and the course of business as conducted by the Defendant, when the Anti-Trust Act,

⁶Record, q. 134, p. 46; q. 16, p. 51.

⁷Record, pp. 218, 224, 234, 238.

⁸Record, q. 147, p. 199.

upon which this proceeding is based, was enacted. It was passed on the 23d day of March, 1903, and is as follows:

ACTS 1903, CHAPTER 140.

That from and after the passage of this Act all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are hereby to be against public policy, *unlawful*, and void.

SEC. 2. *Be it further enacted*, That any corporation chartered under the laws of the State which shall violate any of the provisions of this Act shall thereby *forfeit its charter* and its franchise and its corporate existence shall thereupon cease and determine. Every *foreign corporation* which shall violate any of the provisions of this Act is hereby denied the right to do, and is *prohibited from doing business* in this State. It is hereby made the duty of the *Attorney General* of this State to *enforce these provisions by due process of law*.

SEC. 3. *Be it further enacted*, That any violation of the provisions of this Act shall be deemed, and is

hereby declared to be destructive of full and free competition and *a conspiracy against trade*, and any *person or persons* who may engage in any such conspiracy or who shall, as principal, manager, director, or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders made in furtherance of such conspiracy, shall, upon conviction, be *punished* by a *fine* of not less than one hundred dollars nor more than five thousand dollars, and by *imprisonment in the penitentiary* not less than one year nor more than ten years; or, in the judgment of the Court, by either such *fine or imprisonment*.

SEC. 4. *Be it further enacted*, That any *person or persons*, or *corporation* that may be injured or *damaged* by any such arrangement, contract, agreement, trust, or combination, described in section 1 of this Act, may sue for and *recover* in any court of competent jurisdiction in this State of any person or persons or corporation operating such trusts or combination, the *full consideration* or sum paid by him or them of any goods, wares, merchandise or articles, the sale of which is controlled by such combination or trust.

SEC. 5. *Be it further enacted*, That it shall be the *duty of the Judge of the Circuit and Criminal Courts* of this State specially to *instruct grand juries* as to the provisions of this Act.⁹

⁹All italics are ours.

HISTORY OF THE TENNESSEE ANTI-TRUST ACT.

In the year 1889 the State of Texas enacted an anti-trust law, the thirteenth section of which was as follows: "*The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*" And in the year 1893 the State of Illinois enacted an anti-trust law, the nineteenth section of which was identically the same as this thirteenth section of the Texas statute.

In 1897 the Legislature of Tennessee enacted an anti-trust law, the *fourth* section of which was a *verbatim* copy of this nineteenth section of the law of Illinois.³

In 1900 the Tennessee statute of 1897 came up before the Supreme Court of Tennessee for review, in *State v. Schlitz Brewing Co.*⁴ In the meantime, the Illinois statute had been pronounced unconstitutional (as a piece of *arbitrary, class* legislation), by the Federal Court sitting in that State, because of the provision excepting farmers and stock-raisers, hereinbefore set out.⁵ This Connelly Case was presented as authority when the Schlitz Brewing Co. case was heard, but the Tennessee Court refused to follow it. "We decline to follow that decision," said Judge

³Acts 1897, Ch. 94.

⁴104 Tenn., 715.

⁵*Union Sewer Pipe Co. v. Connelly*, 99 Fed. Rep., 354.

Caldwell, "unsupported by discussion or the citation of authorities, as it is, over our own conviction, and in the face of the numerous cases mentioned in this opinion."⁶

Accordingly, on the 8th day of June, 1900, that Court declared that the Tennessee statute of 1897 was valid, and that the classification recognized by its fourth section was not arbitrary, but just and reasonable.⁷

But the Connelly Case was brought to *this Court*, and on the 10th day of March, 1902, it was *affirmed*. This Court held that the exception in favor of stock-raisers and farmers *was* capricious and arbitrary, and rendered the whole act unconstitutional and void.⁸ This decision, of course, paralyzed the Tennessee Act, forasmuch as it contained identically the same fatal provision. To meet that decision, the Legislature of Tennessee, on the 23d day of March, 1903, re-enacted the statute (which was chapter 94 of the Acts of 1897) with the exception that this vitiatory provision in favor of farmers and stock-raisers (section 4) was omitted.

The Federal questions now presented, have *not* been considered heretofore by the Supreme Court of Tennessee.

The Attorney General of Tennessee contended in the Supreme Court of that State on the trial of this case that

⁶104 Tenn., 737.

⁷*State v. Schlitz Brewing Co.*, 104 Tenn., 715.

⁸184 U. S., 554.

this Act *had* been "assaulted" in *Schlitz Brewing Co. v. The State*, 104 Tenn., 715, and *Standard Oil Co. v. The State*, 117 Tenn., 618, 676, on the ground that it denied the equal protection of the laws and deprived the Defendant of property without due process of law, and that in both cases the assault had been "repelled" by that Court.⁹

That Court admitted in the opinion in the present case, that the Schlitz Brewing Co. case had been "disapproved" by *this* Court, and "inferentially disapproved" by *that* Court also in one other respect, but it said nevertheless that it remained "unshaken" as to the proposition that it is *not necessary* under this Anti-Trust Act, to have an *antecedent criminal conviction* in a court of law, in order to sustain a bill of ouster in equity, but that the bill can be filed at once.¹

Nevertheless, we submit that it will be seen upon an examination of the two cases referred to, that in *neither* of them was either of the *Federal* questions which are *now* presented, considered or decided. True it is that the Court in the *Schlitz Brewing Company Case* held that the Act does not require that there shall be an antecedent criminal conviction at law, before a bill of ouster upon relation can be filed, for the *stated* reason that the proceedings are *independent* and cumulative. In *that* case it was expressly held that the Act prescribes (1) criminal punishment, (2)

⁹Brief, Printed Record, p. 496, side page 683.

¹Opin. Rec., p. 527, side page 726.

pecuniary civil liability, (3) and a forfeiture of the right to do business.²

It was there held that the provision for the forfeiture of the right to do business was "*apart from, and independent of, a criminal prosecution,*" and for *that* reason an antecedent criminal conviction was not essential, as a basis for a bill of ouster in equity. The Court said that it was "entirely without dependent connection with either the criminal responsibility, or the pecuniary liability prescribed by the statute."³

In *Standard Oil Company v. The State*, 117 Tenn., 618, it was held that the statute did *not* subject an offending corporation to a *criminal* prosecution *at all*; that a *corporation* could neither be indicted nor fined under the statute. That is to say: The *Schlitz Brewing Company Case* held that the statute *does* provide for a criminal prosecution, *and also* for a bill of ouster in equity against corporations, but that these were cumulative, disconnected, and wholly independent procedures, and consequently that an antecedent criminal conviction is not necessary to support the bill of ouster in equity. In the *Standard Oil Company Case* (Holt's Case), it was held that there can be no criminal conviction or criminal procedure against corporations at all. In the *present* case the Court said with respect to the two cases just mentioned, that the Schlitz Brewing

²104 Tenn., 748.

³104 Tenn., 751.

Company Case remained "unshaken" as to the point that the *antecedent* criminal conviction was not necessary, in order to maintain the bill of ouster in equity.⁴ The decision to the effect that the Act provided for and allowed a criminal prosecution, undeniably *is* shaken by the later decision which holds that the statute does not authorize a criminal prosecution at all. It follows that the first construction must now be taken to have been an erroneous interpretation of the statute. The Schlitz Brewing Company Case did hold that an antecedent criminal conviction was not necessary to support a bill of ouster, *not* because a criminal prosecution was not provided for (for the Court said that it *was*), but because the procedures were *independent* and cumulative. The later case holds that an antecedent criminal prosecution is not necessary, because (it says) there can be no criminal conviction, antecedent or subsequent, at all. True it is, that both cases agree that a bill of ouster in equity may be maintained independently of criminal procedures, but for altogether different reasons, and upon *directly contradictory* interpretations of the statute. Consequently they cannot be cited as concurring authorities for the same proposition.

Neither of the cases is authority for the contention that this statute does not deny the equal protection of the laws, nor deprive this Company of property without due process of law under the Fourteenth Amendment. *That question*

⁴Record, opinion, p. 521.

was neither considered nor decided in either of the cases referred to. The first decision of that question ever made by the Supreme Court of Tennessee, was made in the present case, which this writ of error is prosecuted to reverse.

It is well settled that even though a statute may have been enforced by repeated decisions in which constitutional objections were *not* presented and considered, when they *are* presented, the previous decisions are regarded as being without force.⁵ It results that the Federal question now presented is *res integra*.

This Act was construed by the Supreme Court of the State in *State v. Standard Oil Company*, 117 Tenn., 619, 642. As construed, it means that it is restricted to, and operate upon, *intra-state commerce alone*. The Court said that the word "importation" in the first section was "inaccurately" used. The Act relates alone to intra-state commerce.⁶ No *corporation* can be either indicted or fined, under this Act.¹ It inflicts a "severe punishment" on offending corporations—dissolution as to domestic corporations, and ouster with respect to foreign ones.² "*The only distinction made in the statute, between natural persons and corporations violating its provisions, is in the punish-*

⁵94 U. S., 6412, Lewis Suth. Dam., sec. 484; *Gribble v. Wilson*, 101 Tenn., 612.

⁶117 Tenn., 642.

¹*Ib.*, 654.

²*Ib.*, 649.

ment provided."³ The Attorney General of the *State*, not a district attorney general, is the proper officer "*to enforce such punishment.*"⁴ The appropriate procedure is a bill in equity in the name of the State by the Attorney General as relator. Such is the construction which this Act has received.

It is no answer to say (as the Attorney General does) that in the criminal case⁶ this same Defendant, the Standard Oil Company, insisted, and successfully, that it could neither be indicted nor fined under the Tennessee Anti-Trust Act. The reason why it was held in that case that it could not, was that the *statute had substituted* a bill in equity for the indictment, and ouster for the fine; and the criminal procedure in that case was based upon this statute. The Act *could* have provided for criminal proceedings, but (the Court said) it did not.

The present proceeding is a bill of ouster in equity. *Here* the question is presented, and for the first time, whether *this* procedure is in conflict with the Constitutions of Tennessee and the United States. In the former case⁷ the question was as to the *meaning and interpretation* of

³*Ib.*, 664.

⁴117 Tenn., 653.

⁶117 Tenn., 618.

⁷117 Tenn., 618.

the statute, and the Court concerned itself only with an *interpretation* of the statute. *Here*, the question is as to the *validity* of that interpreted statute—whether it squares with the Constitutions which must control.

Our contention is that it does not. Our first contention is that it has (very properly) provided for the indictment and regular common-law trial of *persons* who violate its provisions, yet unjustly *denies* that form of procedure and trial to *corporations* that violate its provisions. If the point be well taken, it is obvious that the Act denies to accused corporations the equal protection of the laws, in that it accords to *persons* the right of trial by jury (with certain recognized established *rights of defense*) as the Constitution of Tennessee requires, but denies these rights to *corporations*, thereby refusing to them that right of trial which the State *Constitution* gives to persons, and therein denying the equal protection of the laws, and violating the Fourteenth Amendment.

It would be a denial of the equal protection of the laws if the right to be charged by indictment and tried by a jury, had not been secured by the Constitution or laws of the State, the same as it is with that right so secured, for the reason that these rights being accorded by the statute to *natural* persons, "Equal Protection" forbids them to be denied to corporations.

It is upon this principle that the Standard Oil Company now contends that when *persons* are given the right of

trial by jury; are allowed a form of trial in which they can interpose the defense of the statute of limitations; and are required to be proven guilty beyond a reasonable doubt, *corporations* to which all these rights are *denied*, are denied the equal protection of the laws.

The Standard Oil Company does not complain of the fact that different *kinds* of punishment are inflicted. Fines could have been imposed on both persons and corporations, but it was not obligatory on the Legislature to impose them. Imprisonment could not possibly have been imposed on both, since corporations cannot be corporally imprisoned. Therefore the fact that one who *can* be imprisoned *is* imprisoned, while one who *cannot* be imprisoned is *expelled* from the State, or dissolved in lieu of imprisonment, we have all along conceded, can be no just ground of complaint.

THE SITUATION AT GALLATIN OCTOBER 12, 1904.

Mr. J. E. Comer was the Company's "Special Agent" at Nashville. As such, he was in control of Middle Tennessee. Gallatin is twenty-eight miles distant from Nashville, and in Sumner County, in Middle Tennessee. O'Donnell Rutherford was the "local agent" at Gallatin, in charge of the sub-station there. C. E. Holt was the traveling salesman in that territory. Mr. C. T. Collings, vice president, was in general control, with headquarters at Cincinnati, Ohio. Salesman Holt and Local Agent

Rutherford received all their orders from Mr. Comer, Special Agent. Mr. Comer received his orders from Mr. Collings, vice president. Mr. Collings fixed the prices and gave them to Mr. Comer, and he gave them to the salesmen and local agents. No one had authority to alter the prices, or to depart from them in any way.⁵ The Company had storage tanks of large capacity at Gallatin, from which it sold and distributed oil to its customers by means of tank-wagons, within a radius of *twenty-five miles*. It had 15,363 gallons of oil in its storage tanks at Gallatin in October, 1903.

By reason of its complete system, the Company had *practically* a monopoly of the business. No competitor had tanks and delivery wagons in Tennessee, except at the principal cities—Nashville, Memphis, Knoxville, and Chattanooga.⁶

The *Evansville Oil Company*, an Indiana corporation, was engaged in the oil business at Evansville, Indiana. It had never done any business at Gallatin, Tennessee. The Attorney General says it is "one of the few *independent*" companies. It is this kind of an "independent" company—one of a number of companies that have *combined* under the names of the "United States Pipe Line" and the "Pure Oil Company" to compete with the Standard Oil Company. The members of this self-styled "independent"

⁵Opinion, Record, p. 530.

⁶Record, p. 195.

combination have *parceled out* the United States into districts, among themselves, under an agreement which *restricts* each member's business to his *allotted* district. Tennessee was allotted by this "independent" trust, to the Evansville Oil Company.⁷

In October, 1903, Mr. Rosemon, a traveling salesman of that company, visited *Gallatin*, to sell oil. On the *fifth* day of that month he took orders for various quantities of oil from divers merchants there—for 62 barrels in all. Among others were these:

S. W. Love—Order for 10 barrels.

J. E. Cron—Order for 10 barrels.

L. C. Hunter—Order for 5 barrels.

W. H. Lane—Order for 5 barrels.

Total—30 barrels.

The oil was *to be delivered* to these merchants at Gallatin, about November 1, 1903, in original packages (barrels), and was *to be shipped* from Oil City, *Pennsylvania*, via Cairo, Illinois.⁸

Salesman Rosemon turned over these orders to his principal, the Evansville Oil Co., *at Evansville, Indiana*, on the 8th day of October, 1903.⁹ The oil could have been delivered at Gallatin from Oil City in "two or three

⁷Record, pp. 122, 123.

⁸Record, pp. 126, 505.

⁹Record, p. 103.

weeks.”¹ It arrived at Gallatin on the 3d day of November, 1903,² but the orders which the four merchants above named had given had been *countermanded* in the meantime by telegraph, on the *twelfth* day of October, 1903—over three weeks *before* the oil reached Gallatin.³ The countermanding telegrams were received by the Evansville Oil Company on the twelfth and accepted—that is, *assented* to by it.⁴ And although a carload of *seventy-two* barrels of oil was shipped to Gallatin, nevertheless, neither Mr. Love, nor Mr. Lane, nor Mr. Cron was ever asked by the Evansville Oil Company to take any of it.⁵ That is to say, the countermanding orders were received and assented to *before* the oil was shipped from Oil City. When the representative of the Evansville Oil Company was asked on the witness-stand whether the oil had been *shipped* out on the 12th day of October, when the countermanding telegrams were received, he replied that it had been “*ordered*” shipped—clearly showing that it had *not* been shipped out, but that the *Evansville*, Indiana, office had merely “ordered” the office at *Oil City*, Pennsylvania, to ship it.

The settled *custom* of the trade is that orders given by

¹Record, p. 126.

²Record, pp. 111, 117.

³Record, p. 41.

⁴Record, p. 110.

⁵Record, pp. 41, 56, 70.

merchants for oil, may be countermanded at any time before shipment, at the pleasure of the purchaser.⁶

Indeed, the Supreme Court of Tennessee admits, in view of this custom and the evidence, that *if* the merchants had made the countermands of their own motion, “*unmoved by combination or agreement*” with the Defendant or its agents, “there would be no ground for action.”⁷

A *practice* has sprung up out of this custom, which is *not fair trade, but they all do it*. That is, for one oil dealer to induce a merchant to countermand an order given to a competitor, but not yet filled. It is practiced by the Standard Oil Company’s salesmen; and the salesmen of its competitors, the “independents” (in the combination) *practice it on the Standard Oil Company*.⁸

The State Court finds that Salesman Holt went to Galatin on the 12th day of October by the direction of Mr. Comer to see about “holding his trade,” and to get the merchants, who for years had been regular customers of the Standard Oil Company, *to countermand* these orders. The Supreme Court of Tennessee says that Mr. Comer authorized Mr. Holt to secure these countermands by gifts

⁶Record, q. 195-8, pp. 202, 203; p. 316; q. 44-7, p. 53; q. 17-19, p. 39; q. 37, p. 82; pp. 254, 255; q. 8, p. 67; q. 195-8, p. 202.

⁷Opinion, Trans., p. 539.

⁸Record, p. 316; q. 95-8, p. 202.

of oil, if necessary.⁹ Mr. Holt and the four merchants above mentioned, *separately* came to agreements; but they were all substantially the same. The agreement with each was that in consideration of so many gallons of oil (300 in the aggregate) or 10 gallons per barrel for every barrel previously ordered, of the Standard Oil Company, to be delivered as called for, the merchants would, (and they did), countermand the orders given on the 5th day of October to the Evansville Oil Company. These agreements were all made on the 12th day of October, 1903. Countermanding telegrams were written out and signed by the merchants, but paid for and sent immediately by Salesman Holt. They were all like that sent by Mr. Love, which was as follows:

“GALLATIN, TENNESSEE, Oct. 12, 1903.

To Evansville Oil Co., Ind.:

Kindly countermand our order for 10 barrels of oil.
S. W. LOVE.”

This is all there is in the Gallatin transaction.

There was *no agreement* or understanding that any of these merchants should *buy oil thereafter*, from the Standard Oil Company alone.

There was *no agreement* or understanding that they should *not* buy any more oil from the Evansville Oil Com-

⁹Record, p. 538.

pany. So far as any *agreement* was concerned, they were free to purchase again from that Company, at pleasure. *It was not a continuing, or working agreement.* It was a gift direct, that was completed and ended the moment it was made, and the countermanding telegrams sent.

Nevertheless, this agreement is said, and was adjudged by the Supreme Court of Tennessee, to be a combination or arrangement or agreement or *conspiracy against trade*, and a criminal violation of the State Anti-Trust Act.

The Supreme Court of Tennessee concedes that "neither the countermand of the order, nor the giving the oil were in themselves criminal, and either could have been done by the parties acting *without concert*, but they could not *agree* to have the order countermanded in consideration of the *gift of oil, for the purpose* of lessening competition, or if such countermand was *intended* to effect that purpose."¹

The Attorney General states that soon after this transaction the Defendant *advanced* the price of its *inferior grade* of oil "one cent a gallon."

It is true that the *grade* of oil which the Defendant was selling from its *bulk*-stations in tank-wagons, was not of as high grade as that which the Evansville Oil Co. proposed to sell in *barrels*. But it is also true that it was sold at a *lower* price. And it is also true that the Defendant itself handled a higher grade of oil in *barrels*, but that its

¹*Holt's Case*, 117 Tenn., 623; Opin. Record, p. 539.

sale of *high-grade* barrel oil was not one-half of one per cent of its sales of lesser grade oil in bulk. This is not denied by the Supreme Court of Tennessee, and part of it is admitted.²

Assuming the facts to be precisely as stated by the Supreme Court of Tennessee, the case is this:

1. By a settled usage of the trade, it is allowable for merchants dealing (without concert) to countermand orders for oil—for a good reason, or for a bad reason, or for no reason at all.³

2. The orders were given by *Tennessee* merchants, to an *Indiana* dealer. They were given *in Tennessee*, to an *Indiana* drummer, for oil to be delivered in the future. The oil was to be transported from Oil City, *Pennsylvania*, by way of Cairo, Illinois, and to be delivered to the Gallatin merchants, the purchasers, in Tennessee.

3. The Gallatin merchants, and the Standard Oil Company's agent came to the agreement that in consideration of the *gift* of certain quantities of oil, the merchants would countermand the orders they had given to the Evansville Oil Company; and they did then countermand them accordingly.

²See Opin., Trans., pp. 538, 539, 537. And for the evidence which proves it, see Appendix to this brief, pages 146, 147.

³Opinion, Trans., p. 539.

4. The agreement was *restricted to these orders alone, and related to nothing else.*

5. The *purpose* of the agreement was to *protect* oil which the Standard Oil Company *then* had stored in its tanks at Gallatin, for sale, *from the COMPETITION of the oil to be imported by the Evansville Oil Co.*⁴

6. Upon these facts the Supreme Court of Tennessee holds that the agreement was a criminal violation of the *State* anti-trust law.

THE CRIMINAL PROCEEDINGS IN 1904.

At the May Term, 1904, of the Circuit Court of Sumner County, Tennessee, an indictment was found against the Company and its agents, Holt and Rutherford; and they were all subsequently put on trial. Mr. Comer, the Special Agent in charge at Nashville, was not indicted. Rutherford was acquitted. The Company and Salesman Holt were found guilty, and both were *fined*. On appeal the judgment as to Holt was affirmed by the Supreme Court of Tennessee, but *reversed* as to the Company. The indictment was quashed as to it, on the ground that a *corporation* could neither be indicted nor fined, under the terms of the Anti-Trust Act, but should be proceeded against by bill of ouster, in equity, upon the relation of the Attorney General under section two of the Act. That case is known

⁴Opinion, Trans., p. 527.

as *Standard Oil Company v. The State*, 117 Tenn., 618. In accordance with the opinion therein expressed, the bill in *this* case was filed by the Attorney General, as hereinbefore explained, and the decree rendered herein, forfeiting the right to "do business" in Tennessee.

THE FEDERAL QUESTIONS.

There are two Federal questions in this case, and if we understand them they are not "frivolous."

The first one arises under Article 1, Section 8, of the Constitution of the United States, the Interstate Commerce Clause, and it is this:

Congress has legislated with respect to conspiracies, and combinations against interstate commerce, that legislation being known as the "Sherman Act." The conspiracy which the Defendant and the Gallatin merchants engaged in, was against *inter-state* commerce, and therefore an offense against the Sherman Act, and *not* an offense against the *State* Anti-Trust Act.

The second Federal question is this:

The Tennessee Anti-Trust Act is a *general criminal law*. It is *not* a law relating to corporations *as such*, neither is it a law prescribing the *conditions* on which foreign corporations are admitted to Tennessee. It is a *general criminal law*, leveled at conspiracies against trade, whether committed by persons or corporations, equally and alike.

Persons accused of violating its provisions, must be proceeded against by indictment, or presentment. They are entitled to be tried by a *jury*. Their guilt must be established *beyond a reasonable doubt*. They can rely upon the statute of limitations as a defense, when it has run.

But *corporations* accused of violating the provisions of this act, may be proceeded against by *bill in equity* upon relation, where they are *denied* (1) the judgment of a grand jury as to whether they shall be put to answer the charge by indictment or presentment; (2) *denied* the right of trial by jury; (3) *denied* to have their guilt established beyond a reasonable doubt, and may be found guilty upon a bare *preponderance* of the evidence; and (4) *denied* the right to interpose the statute of limitations as a defense. This discrimination between persons and corporations for *the same offense* is arbitrary and unreasonable, and a *denial of the equal protection of the laws*.

The first of these two questions is stated in the following

PROPOSITION.

The Anti-Trust Act of Tennessee, upon which the present proceeding is based, as applied and enforced by the Supreme Court of that State, is void, because it is a regulation of interstate commerce.

“Commerce among the several States” is not a technical legal conception, but a *practical* one, drawn from the course

of business.¹ "Commerce" is a term of the largest import. It comprehends intercourse for the purpose of trade, in any and all its forms, including the transfer, purchase, sale, and exchange, of commodities between citizens of our country and citizens or subjects of other countries, and between citizens of different States.² *Transportation* is an indispensable element in interstate commerce.

The negotiations of sales of goods, which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.³ The fact that the *negotiation* takes place in a State is immaterial, because the simplest and purest transaction of *inter-state* commerce must take place *somewhere*.⁴

In *Lowe v. Lawlor*, 208 U. S., 274, 301, this Court said that

"If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the *means* operated at *one* end *before* physical transportation *commenced*, and at the *other* end *after* the physical transportation *ended*, was immaterial."

¹196 U. S., 398; 203 U. S., 512.

²*Walton v. Missouri*, 91 U. S., 280.

³*Robbins v. Shelby Taxing District*, 120 U. S., 497.

⁴*Rearick v. Pennsylvania*, 203 U. S., 507; *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211; *United States v. Swift*, 122 Fed. Rep., 529; *Judson, Interstate Commerce*, 115.

The word "regulate" is also one of large import. "It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this Court will perceive how broad and comprehensive it has been held to be."⁵

A State can no more prohibit or regulate commerce which is interstate, than it can prohibit or regulate that with foreign nations.⁷

A State cannot tax interstate commerce at all, even though the same amount of tax attempted to be imposed, is laid on intrastate commerce as well.⁸

"All that portion of commerce with foreign countries, or between the States, which consists in the *transportation, purchase, sale, and exchange of commodities*, is *national* in its character. *Here*, there can, of necessity, be only *one* system or plan of regulation, and *that*, Congress alone can prescribe."⁹

* In *Walton v. Missouri*, 91 U. S., 275, the Court said:

"The general power of the State to impose taxes in the way of license upon all pursuits and occupations within its limit is admitted, but, like all other powers, must be exercised in subordination to the requirements

⁵*St. Louis v. Western Union Telephone Co.*, 149 U. S., 469.

⁷*R. R. Co. v. Husen*, 95 U. S., 469.

⁸*Robbins v. Shelby Taxing District*, 120 U. S., 497.

⁹*Mobile v. Kimball*, 102 U. S., 697.

of the Federal Constitution. Where the business or occupation consists in the *sale* of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods or indirectly from them through a license to the dealer; but if such tax conflict with any power deposited in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a *personal* license."

The fact that property in Tennessee enjoys the protection of the laws of the State, is not enough *of itself*, to justify State taxation.¹

The fact that the *parties* themselves are not engaged in interstate commerce, is immaterial, because the Sherman Act makes no distinction between classes. It provides that *every* contract or conspiracy in restraint of trade shall be illegal.²

A party is entitled to be protected against a violation of his constitutional right, whether that violation result from the *terms* of a statute, or from the *manner* of its enforcement.³

¹*General Oil Co. v. Crain*, 209 U. S., 211, 236.
Moody, J., dissenting.

²*Lowe v. Lawler*, 208 U. S.

³*General Oil Co. v. Crain*, 209 U. S., 211, 228.

Whenever a statute of a State invades the domain of legislation which belongs exclusively to the Congress, it is void, no matter under what class of powers it may fall, or how closely it may be allied to powers conceded to belong to the States.⁴

The "police power" of a State is extensive, but it cannot be exercised over a subject confided exclusively to Congress—as interstate commerce has been.⁵

"Whatever may be the nature and reach of the police power of the State, it cannot be exercised over a subject confided exclusively to Congress."⁶ As said in *Crutcher v. Kentucky*, 141 U. S., 59-62, the decisions of this Court are clear to the effect that:

"Neither license, nor *indirect* taxation of any kind, nor any system of State *regulation*, can be imposed upon interstate, any more than upon foreign, commerce; and that all acts of legislation producing any such results are, to that extent, unconstitutional and void."

Any State *statute*, or *contract between persons*, which *obstructs* commerce, "regulates" it, within the contempla-

⁴*Henderson v. Mayor, etc.*, 92 U. S., 260, 271.

⁵*Railroad v. Husen*, 95 U. S., 471, 473, 474; *Brennan v. Titusville*, 153 U. S., 209, 300.

⁶*Russell on Police Power*, 149; *R. R. v. Husen*, 95 U. S., 465.

tion of the Constitution; for to limit, restrict or *obstruct* commerce, is to “regulate” it.⁷

As said by Mr. Justice Brewer in *In re Debs*, 158 U. S., 564:

“If a *State*, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary *association of individuals* within the limits of that State, has a power which the State itself does not possess?”

This was quoted with approval in *Lowe v. Lawler*, 208 U. S., 304.

“Regulation, to any substantial extent, of such a subject by any other power than that of Congress after Congress has itself acted thereon, even though such regulation is *effected* by means of *private contracts* between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by *individuals* as by the State itself. In both cases it is an attempt to regulate a subject which for the purposes of regulation has been, with some exceptions, such as are stated in *Mobile County v. Kimball*, 102 U. S., 691 (*and other cases cited*), exclusively granted to Congress; and

⁷*Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 229, 230; *Northern Securities Co. v. United States*, 193 U. S., 344; *Railroad Co. v. Husen*, 95 U. S., 465; *In re Debs*, 158 U. S., 564; *Lowe v. Lawlor*, 208 U. S., 304.

it is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other.”⁸

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 247, this Court said that:

“Although the jurisdiction of Congress over commerce among the States is full and complete . . . it does not acquire any jurisdiction over *that part* of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State, and also that which is interstate.

“In regard to such of these Defendants as might reside and carry on business in the same State where the pipe provided for in any *particular* contract was to be delivered, the sale, transportation and delivery of the pipe by them under *that* contract would be a transaction wholly within the State, and the statute (*the Sherman Act*) would not be applicable to them in *that* case.”

That is to say, when a combination of manufacturers enter into a *general* agreement to regulate the sale, price and delivery of merchandise under contracts for sale and

⁸*Addyston Pipe & Steel Co. v. United States*, 175 U. S., 230.

delivery in their own States, as well as in the States of each other, *particular* contracts which are interstate transactions are subject to the operation of the Sherman Act, and *particular* contracts which are intra-state transactions, are subject to the State Anti-Trust Act.

In *that* sense, and in that sense only, do the two systems of laws operate at the same time. One system operates upon the particular contract in its relation to a certain class of transactions—intra-state transactions. The other system operates upon another particular contract in its relation to another and different class of transactions—inter-state commerce transactions. But still the operation of each is separate and distinct. They do not over-lap.

For this reason it is all-important to determine to which class of transactions the particular combination or conspiracy agreement relates. In Prentice & Egan's Commerce Clause of the Constitution of the United States, 336, it is said that "it is equally clear that State statutes and the Federal statutes upon this subject cannot both operate upon the *same* contract at the same time."

The power of the United States, and the power of the States, to regulate commerce do not overlap. They are separate and distinct. Interstate commerce is beyond the reach of any State power. Intra-state commerce is beyond the reach of Federal power.

This does not mean that a State cannot enact legislation which, to a *limited* extent will *affect* the *instrumentalities*

of interstate commerce. This distinction, namely: that the States cannot legislate with respect to interstate commerce at all, but may legislate with respect to the *instrumentalities* of interstate commerce, and thereby affect it *indirectly* to some extent, has often been overlooked. This distinction has been most clearly stated by Hammond, J., in *L. & N. R. R. Co. v. R. R. Commissioners of Tennessee*, 191 Fed. Rep., 709, when he said:

“The power of Congress to regulate such an instrumentality of commerce (steamboats) is practically unlimited, because *it* may reach the *commerce* itself, as well as its *agencies*; wherefore there is no need to look to the character of the *regulation* in determining the power, but only to the character of the *commerce*. But when we turn to the power of the *States*, we must necessarily scrutinize *both*. The *definition* of interstate commerce, as given in these cases, does not change; *it* is fixed, whether Congress has acted or not acted, and the real question as to the States, always is two-fold: Does the proposed law act upon the *commerce itself*, or does it act *only* on the *instrumentality*? If the first, it is always void; if the second, its validity depends on the circumstances. Here lies the fallacy of this, and all legislation which overlooks the not always broad distinction between regulating the *commerce itself* and the *instrumentalities*, and we have the authority of the Supreme Court in the next case cited, for saying it is often disregarded.”⁹

⁹The Court cites *Mobile County v. Kimball*, 102 U. S., 691, 702.

Upon interstate commerce the States may lay no burden whatever, because *that* amounts to a regulation of it; and the regulation of commerce belongs to Congress alone. On the other hand, it is frequently said that "in matters which are *auxiliary* to commerce," or which may be used in *aid* of commerce," the powers of the States, in the absence of Federal action, are unimpaired.¹

Thus it appears that when State legislation hits *inter-state commerce itself*, it is not necessary to inquire as to the nature or character of the regulation. Whatever its nature may be, it is void—void because it regulates interstate commerce; regulates commerce wholly beyond the reach of the State. But when the State legislation relates to the *instrumentalities* of interstate commerce, instead of to interstate commerce itself, such legislation may or may not be void, according to the circumstances of the case. In *such* case the *nature* or character of the *regulation*, and also of the *commerce* itself, must *both* be considered in order to determine the question.

To illustrate: A statute of Louisiana provided for the appointment of gaugers to measure and determine the capacity of coal-boats and coal-barges. These, for the most part, came from States above, down the Mississippi to

¹*Prentice v. Egan*, Commerce Clause, Fed. Const., 189; *Leloup v. Mobile*, 127 U. S., 640, 648; *Robbins v. Taxing Dist.*, 120 U. S., 489; *Mobile v. Kimball*, 102 U. S., 691, 702.

New Orleans. A fee of \$5.00 for each barge, and \$10.00 for each boat, was to be paid the gauger; and it was made unlawful to sell coal from any boat or barge before it had been inspected and gauged. This act was held to be valid.¹ As will be observed, the statute related to the *instrumentalities* of commerce, and affected *commerce*, indirectly and slightly. It related merely to the measurement of *boats* used in commerce, but did not relate to the facility of the transportation, and of the loading and unloading.

Upon the other hand, in *Rearick v. Pennsylvania*, 203 U. S., 507, an ordinance of the Borough of Sunbury, Pennsylvania, made it unlawful for any person to *sell* by retail on the streets, or by traveling from house to house, foreign or domestic goods not of the party's own manufacture, without a license. *Rearick* did this—by selling and taking orders for an *Ohio* corporation. This ordinance was held to be void, and for the reason that the transaction to which it related was interstate commerce *itself*; because “interstate commerce cannot be taxed at all, even though the same amount of tax be laid on domestic commerce, or that which is carried on solely within the State.”²

“Regulation” is not necessarily the imposition of a *burden*. The *Federal* Statutes, for illustration, authorize railroad companies whose roads are operated by steam, to carry

¹*Pittsburg, etc., Coal Co. v. La.*, 156 U. S., 590.

²*Robbins v. Shelby Taxing District*, 120 U. S., 489, 497.

passengers and property from State to State, and to connect with roads of other States. This statute is a regulation of commerce, but obviously it imposes no *burden*.³ There are *State* enactments, also, which, while imposing no burden, directly, are, nevertheless, void. For example, a State law, acting *outside* of the State, prescribing and fixing *reasonable* rates, would impose no burden, and yet will offer a possibility of conflict between regulations of different States, and would be void *as* a regulation of interstate commerce.”⁴

The *statute* of a State which “regulates” interstate commerce, is void.

Any *contract* between persons which obstructs, limits, or restricts interstate commerce, is also void.⁵

“Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts, or otherwise, the prohibition is not confined to that form alone. All combinations which

³*R. R. Co. v. Richmond*, 19 Wall, 584; *Richmond v. Railway Co.*, 33 Iowa, 422.

⁴Prentice & Egan, Commerce Clause, Fed. Const., 189.

⁵*Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 229, 230; *Northern Securities Co. v. United States*, 193 U. S., 344; *R. R. Co. v. Husen*, 95 U. S., 465.

are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever."⁶

Every contract, combination or conspiracy, the necessary effect of which is to restrict competition in interstate commerce, is in restraint of trade, within the meaning of the Sherman Act.⁷

"Where a contract to buy, sell, or exchange goods, to be transported among the several States, operates to restrain trade, it is a violation of the Federal law."⁸

The Sherman Act superseded and abrogated all conflicting State statutes and general laws.⁸

The omission of Congress to make regulations with respect to such subjects indicate the intention that they shall be free from all restrictions or impositions by any State.[†]

But Congress has acted; it has legislated with respect to combinations, conspiracies, trusts, and agreements to

⁶*United States v. Freight Ass'n*, 166 U. S., 324, 326.

⁷*United States v. Swift & Co.*, 122 Fed. Rep., 534.

^{*}Prent. & Egan Com. Clau. Fed. Cons., 329; 38 Am. St. Rep., 223.

⁸*Railway v. Hefley*, 158 U. S., 99; *Railroad v. Horne*, 106 Tenn., 76.

[†]*Leisy v. Hardin*, 135 U. S., 109; *State v. Scott*, 98 Tenn., 257, 260; *Schollenberger v. Penn.*, 171 U. S., 23.

lessen competition in interstate commerce or trade. The "Sherman Act" of 1890[‡] is as broad and sweeping as it can be.

The argument down to this point has been directed to show, and we respectfully submit has shown, that:

1. Congress alone can regulate commerce among the States;

2. Any State *statute*, or any *contract* between persons, that *hits* or *obstructs interstate* commerce, "regulates" interstate commerce, within the meaning of the Constitution of the United States;

3. *State* legislation may relate to the *instrumentalities* of interstate commerce to a limited extent, but it cannot regulate interstate commerce *itself*, at all;

4. Congress, in the exercise of its power to regulate interstate commerce, enacted the Sherman Act, or Anti-Trust Act of 1890, which relates to all contracts and combinations against interstate commerce; and

5. *Every* contract, combination, or conspiracy which obstructs interstate commerce, which restricts competition in interstate commerce is *within* the Sherman Act, and therefore *beyond*, and not within, the provisions of any *State* anti-trust act whatsoever.

[‡]21 Stat. Law, 502; Supp. Rev. Stat., 322.

With these principles to guide, we are now prepared to consider the transaction at Gallatin, Tennessee, which it is claimed is a criminal violation of the Tennessee Anti-Trust Act, and which transaction, we insist, if a conspiracy at all, is a conspiracy against *inter-state* commerce, and a violation of the *Sherman* Act, and therefore *not* a violation of the Anti-Trust Act of *Tennessee*.

The transactions with the four merchants at Gallatin were substantially the same (as already shown), and hence, for the purpose of the argument, may be treated as one. So considered, we have two distinct and definite transactions to contemplate: (1) The *Rosemon*, *executory* agreement with the Gallatin merchants, made on the 5th day of October, 1903, when he took their orders; and (2) the *Holt* agreement with the same merchants, made on the 12th day of that same month, for the countermanding of those orders.

The first, or *Rosemon* transaction, was an interstate commerce transaction, pure and simple. The Evansville Oil Company, the seller, was a citizen of *Indiana*, located and doing business in *that* State. Its traveling salesman, Mr. *Rosemon*, went to Gallatin, Tennessee, to solicit orders and make sales of oil. The oil it proposed to sell was at Oil City, Pennsylvania, and was, by the terms of the agreement, *to be shipped* to Gallatin, Tennessee, by way of Cairo, Illinois.⁹ The Gallatin merchants were citizens

⁹Record, pp. 126, 505.

of Tennessee, doing business at Gallatin, in Tennessee. Drummer Rosemon took the orders of these merchants *in Tennessee*, for the *sale, transportation, and delivery* by the *Indiana* seller, of its *oil*, then stored in *Pennsylvania*, to the purchasing merchants, at *Gallatin, Tennessee*. It was an executory contract, inasmuch as it was for future delivery. It is characterized by an unusual number of interstate commerce features. *It was interstate commerce pure and simple.*¹

Such was the Rosemon agreement, the transaction at which the agreement of October 12th, now denounced as a criminal "conspiracy," was leveled.

On the 12th day of October, 1903, but before the oil had been shipped out from Oil City, Salesman Holt, the agent of the Standard Oil Company, and these same Gallatin merchants, came to an agreement. This agreement was, that in consideration of 300 gallons of oil (in the aggregate), to be delivered by the local agent of the Standard Oil Company, free of charge, as wanted, these merchants would *countermand* or cancel the orders they had given for the thirty barrels of oil to the Evansville Oil Company; and they *did* then countermand them by telegraph. *This is all there was of the "conspiracy."*

It was not continuous. It was not a working agreement. It hit directly and alone at the Rosemon sale, and was ex-

¹Ware v. Mobile Co., 209 U. S., 412.

hausted and ended in the stroke. It neither directly nor indirectly related to any sale by, or purchase from, the Standard Oil Company. It did not assume to bind the merchants to buy the Standard Oil Company's oil. Neither did it assume to bind them not to purchase oil from the Evansville Oil Company. They were free to send in new orders at any time. It did assume to countermand certain *existing* orders given for thirty barrels, and to defeat the delivery of that oil; and it did contemplate that the merchants should refuse to receive that particular oil, if tendered. *This conspiracy directly affected and related to the interstate commerce transaction of October 5, and that alone.* It was meant to, and it did, hit that and nothing but that. If a conspiracy, it was a conspiracy against trade, which was purely interstate trade. The *competition* which it destroyed or affected, was the interstate trade, or competition, of the Evansville Oil Company. This was really conceded by the Supreme Court of Tennessee in Holt's case, when it said that:

"The evidence offered, tended to prove an agreement conceived and effected by the Standard Oil Company and its agents, to *protect* the oil of the Standard Oil Company then stored in Gallatin, from the *competition* of that *about to be imported* and offered for sale by a *competitor*, and *not to protect* that of the Evansville Oil Company *yet to be transported* there."²

²*Standard Oil Co. v. The State* (Holt's Case),
117 Tenn., 646, 647.

That Court repeated and adopted that language in the present case, saying:

"The charge upon which the Plaintiffs in Error were indicted, tried, and convicted, is the alleged making of an unlawful contract and agreement with *S. W. Love* to lessen and destroy competition in the sale of coal oil which the Standard Oil Company had imported into this State and *had, at the time* of the agreement, *stored* in its storage-tanks at Gallatin, and there offered for sale. The charge is that the agreement was made to *protect* oil; *already* imported, and *not* oil *to be* imported. The evidence offered tended to prove an agreement conceived and effected by the Standard Oil Company and its agents, to *protect* the oil of the principal *then stored* in Gallatin, *from competition with that about to be imported and offered for sale by a competitor*, and not to *protect* that of the Evansville Oil Company yet to be transported there.

"A combination affecting interstate commerce, is none the less a violation of the Federal anti-trust statute and punishable under it, where the agreement made *incidentally* affects intra-state commerce; and the same rule will apply to combinations made in violation of the statute of the State upon the same subject, where interstate commerce is *incidentally* affected. If it were otherwise, neither the Federal nor the State laws could be enforced in any case.

"The importation of oil to be made by the Evansville Oil Company, was only the *occasion*, the *incentive*, of the conspiracy charged in relation to that theretofore imported by the Standard Oil Company.³

³Opinion, Record, pp. 526, 527.

"It is true the oil of the Standard Oil Company had been an article of interstate commerce, but it was not when the agreement with S. W. Love was made. It was then *at rest* in this State, and was *subject* to its *revenue* laws and the *police power* of the State. That it was subject to the revenue laws is conceded by the Standard Oil Company, and it had taken out a license and paid the revenue required and imposed by the laws of the State."⁴

Nevertheless, that Court appears to have concluded that the transaction at Gallatin was a criminal agreement, which *directly* affected intra-state commerce, and consequently that it was within the State Anti-Trust Act.

In an earlier case, the learned Judge (Neil, J.), who delivered the opinion of the Court in the present case, remarked that "legal conclusions cannot always be safely reached by pressing the processes of *logical illation* to their ultimate results."⁵

This rule, we submit, the learned Judge has ignored in the present case, since the "logical illation" to which he has arrived appears to have been reached *substantially* this:

The Standard Oil Company at the time this criminal agreement was made, had a large quantity of oil on hand, stored in its tanks at Gallatin, Tennessee. It had imported this oil, but it was then *at rest* in

⁴Opinion, Record, pp. 526, 527.

⁵115 Tenn., 521.

Tennessee, and subject to the "*revenue laws*" and "police power" of the State. The Holt agreement was not made to protect the oil of the Evansville Oil Company about to be transported to Gallatin, but it was made *to protect* that oil of the Standard Oil Co. which had already been imported and was then "*at rest*" at Gallatin, from *competition* with oil of the Evansville Oil Co. about to be imported for delivery under a contract of sale at Gallatin.⁶

Or, stated in still other terms, the basis of the "illation" appears *in substance* to be this:

The motive and purpose of the Standard Oil Company was to *protect* oil which it then had in stock at Gallatin for sale "*from competition* with that (oil) about *to be imported* and offered for sale by a competitor." The merchants, as intelligent business men, were bound to know that this was the motive and purpose of the Standard Oil Company.⁷ As the oil thus sought to be protected from the *competition* of oil about to be imported by a competitor, was *then at rest* in Tennessee, subject to the revenue laws and police power of the State, the transaction was a criminal conspiracy in restraint of *domestic* trade, and *directly* in violation of the *State Anti-Trust Act*. It only affected *inter-state* commerce *incidentally*, and therefore is within the State statute.⁸

⁶Holt's Case, 647; Opinion Neil, J.; Record, pp. 526, 527.

⁷175 Tenn., 675.

⁸117 Tenn., 674; Opin., Rec., pp. 526, 527.

This view we respectfully submit is wholly erroneous and can lead only to “illations” which are unsound.

The occasion or incentive which caused the parties to make the agreement, or the purpose they had in mind when making it, *may* sometimes be circumstances which taint the agreement and make it *illegal*—but they are not *elements* which determine or designate the *kind* of commerce directly affected. Whether such an agreement be an offense against interstate commerce, or whether it be an offense against intra-state commerce, is to be determined alone by the *nature* and *terms* and *effect* of the *agreement itself*. Motive, purpose, and incentive are of comparatively little importance in the determination of *that* question—that is, to determine the *kind* of commerce actually affected.

“Where the contract,”

Says Mr. Justice Peckham,

“affects interstate commerce *only* incidentally, and *not* directly, the fact that it was not designed or intended to affect such commerce, is simply an additional reason for holding the contract valid, and not touched by an act of Congress. *Otherwise*, the design prompting the execution of the contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of *no* importance.”⁹

If it be *conceded* (for argument) that the *purpose* of the Standard Oil Company in entering into the agreement,

⁹*Addyston Pipe & Steel Co. v. United States*,
175 U. S., 234.

was to lessen competition in the sale of the oil which it then had stored at Gallatin, and that the fact that oil was *about to be imported* by the Evansville Oil Company for sale there, was the *occasion* and *incentive* for the conspiracy, and that the agreement was "*conceived* and effected" to *protect* the oil then stored at Gallatin, we are still left in the dark as to the *nature* of the agreement itself. All the facts above stated may tend to show that the character of the agreement was bad, that it was meant to hit and cripple *trade*, but they are not facts of such a character as to enable us to determine *which* trade—whether that offense is *primarily* against interstate commerce, or *primarily* against intra-state commerce. That question can be determined alone by a consideration of the *nature* and *effect of the agreement itself*—not of the *motive*, or *purpose* which the *parties* had in mind, when they made it.

If the circumstance that the *motive* or *purpose* of a combination is to protect merchandise which is at *rest* in the State, from the competition of merchandise of like character, *about to be imported* by a competitor, makes the combination one against domestic commerce (as the Supreme Court of Tennessee holds), obviously it withdraws from the control and protection of the Federal Statutes almost every important transaction in the field of commerce. If *that* be the correct view, there can remain but few combinations for the Sherman Act to operate upon. The reason is, that merchandise must always be *somewhere*, in some *State*. As a rule it is *in transit* only for short periods of

time. The view of the Supreme Court of Tennessee seems to be that so long as it is in actual *transit* it is subject to Federal laws, but so soon as it comes *to rest*, it is subject to the "revenue" laws and "police power" of the State, and that the moment merchandise is "at rest," subject to these State laws, conspiracy *agreements* entered into by the owners of that merchandise to protect it from *competition* on the part *even of other non-resident importers*, are *local* like the merchandise itself which is "at rest," even though such agreements *directly* relate to and destroy *contracts* which are purely of an *inter-state* commerce character. According to *that* court, when the *property* sought to be protected from the competition of like articles, about to be imported for sale for a competitor, is "at rest" in Tennessee, *agreements* obstructing and restraining such importation, take their complexion from the fact that the *property* is at rest, which is sought to be protected, and not from their own nature, effect and terms.

The error of this view will more clearly appear from illustrations: Suppose A and B, merchants at Gallatin, regular customers of the Standard Oil Company, but *without any oil in stock at the time*, of their own motion, and out of dislike for Mr. Rosemon, and with the view of keeping him out of the trade at Gallatin, had *agreed* with Merchants Love, Lane, Cron and Hunter to pay them \$41.50 (the value of 300 gallons of oil) to countermand their orders, and did pay the money, and the four mer-

chants did countermand—would not *that* agreement be a conspiracy against trade, *if* this Holt agreement was one?

Suppose, again, that by reason of lack of transportation or destruction of bridges by tornadoes, it had happened that the Standard Oil Company chanced to have *no oil in stock* at Gallatin, or in Tennessee, at the time this Holt agreement was made, would it have been any the less a conspiracy than it would have been if the Company had chanced to have its tanks full of oil “at rest?” Yet, in both cases, it will be perceived, there was *no oil at rest* in Tennessee, to “protect.” In the case first supposed, A and B, *retail* merchants, did not expect to bring in oil to sell in competition with the Standard Oil Company. In the last case supposed, the Standard Oil Company expected to bring in oil in the near future, but actually had none on hand at the time. In both cases supposed, the element which was *controlling* and determinative according to the *opinion* of the Supreme Court of Tennessee, is *wholly wanting*, namely: the fact that the purpose was to “protect” oil which was *then actually at rest* in Tennessee. According to that view, neither of the *supposed* agreements could possibly be a conspiracy, forasmuch as there was *no oil at rest* in Tennessee for the agreement to protect. Yet it is plain that in their *nature, effect* and *terms*, both the supposed agreements obstruct and restrict the *importation* of oil into Tennessee for sale, by a non-resident competitor, *as much* as the agreement now complained of does.

In *Hopkins v. United States*, 171 U. S., 603, it was insisted that the fact that the stockyards at Kansas City were in two States (Kansas and Missouri) was a material fact in determining the character of the business done; but the Court held that it was not of the "slightest materiality" and that the *business* done at these yards so situated was intra-state in character. The converse of the rule is of course true also. That the yards are in one State instead of two, and already in use and located, would not keep it from being of an inter-state character.

The *principle* which must apply and control, can depend upon no mere *accident* of the case. Commerce, whether interstate or intra-state, deals with merchandise, but it is not itself merchandise. It is traffic *in* merchandise. Agreements in restraint of trade, conspiracies against trade, are not *merchandise*, but they are *agreements*. Whether the merchandise which the agreement *protects from competition*, is already on hand for sale, or yet to be imported for sale, is immaterial—a mere accident of the case. Whether the merchandise *that would* come in to compete, but for the conspiracy, is the fruit of an interstate commerce contract, or of an intra-state commerce contract is material and all-important. Whether the conspiracy agreement hits interstate commerce, or hits intra-state commerce, depends upon the nature and reach of the agreement itself. Whether the *oil* then "at rest" and sought to be *protected* by such agreement from the competition of the Evansville Oil Company, had been imported

from Pennsylvania or had been pumped from wells in Tennessee, is a matter of *no significance* in arriving at the nature, meaning and terms of the criminal *agreement* itself. But whether the oil *excluded* by the conspiracy agreement, was *to come* from Pennsylvania, or from Tennessee is all-important.

If oil-dealers in Tennessee, who are stocked with oil that was found and refined *in Tennessee*; or oil-dealers in Tennessee, who are stocked with oil *at rest* in the State, which had been imported from Ohio; or if oil dealers in Tennessee, who have no oil on hand at all, but expect to purchase and carry it in stock, combine and conspire to break down the *competition of Indiana importers*, they are guilty of a criminal combination in each and every of the three cases alike. The reason is that the *situs* of the oil they are minded to "protect" at the moment the agreement is made, is *immaterial*, since it is a fact which is but an accident of the case. But the fact that the *competition* to be broken down by the agreement, is *Indiana competition* is the controlling and important fact in the case. To say that it is Indiana competition is to say that it is interstate commerce. Whether the conspirators have that oil "at rest" in Tennessee, or not, is wholly immaterial.

If Salesman Rosemon had been representing an oil dealer located and doing business at *Knoxville, Tennessee*, and the orders which he took from the Gallatin merchants were for oil to be shipped from Knoxville, his sales to the Gallatin merchants, or transactions with them, would have

been *intra*-state commerce, and the Holt agreement, if a conspiracy at all, would have been an offense against the State Anti-Trust Act. But inasmuch as Mr. Rosemon was representing an Indiana concern, and his sales contemplated and included transportation by that concern, from another State to Tennessee, *his* transaction with the Gallatin merchants was *inter*-state commerce, and the Holt agreement which *hit* that transaction, if a conspiracy at all, necessarily was an offense against the Federal Statute, the Sherman Act, and *not* against the statute of Tennessee.

The following cases illustrate the rule:

In *Hadley-Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. Rep., 243, C. C. A. (8 Cir), it appears that the Hadley-Dean Company of St. Louis, Mo., gave an *order* to the Highland Glass Company of *Pennsylvania*, for the manufacture, and *delivery at St. Louis*, of a large quantity of window glass. Some of the glass was shipped and delivered, accepted, and paid for; but the purchaser refused to take the remainder. Thereupon, the seller, the Highland Glass Company, sued for a breach of the contract.

One defense was that the plaintiff was a member of a combination that was unlawful under the Anti-Trust Act of Missouri, and that by the terms of *that* statute it could not recover. But it was held that the statute could have no application to this contract, without infringing upon the exclusive authority of congress to regulate commerce among

the States, and that the plaintiff could recover. In other words, the holding was that the State Anti-Trust Statute would be void as a regulation of interstate commerce, if extended and applied to transactions of the character involved in that case.

A statute of New York provided that all goods made by convict labor, offered for sale in that State, should be labeled "Convict Made." The statute did not *prohibit* the sale of convict-made goods, neither did it assume to prohibit their importation. It only required that they should be labeled so as to show that they were made by convict labor.

One Hawkins imported a lot of scrub-brushes from Ohio, which had been made by convict labor, and sold them, *without* the required label. Criminal prosecution under the statute failed, because the statute was held to be void as a regulation of interstate commerce. It related to the *sale* of imported articles—that is, to interstate commerce itself.¹

A statute of South Carolina provided that any vehicle or boat (except *regular* steamers, and railways) transporting intoxicating liquors *into* South Carolina *at night*, should be liable to seizure and confiscation. "The Carolina" (not being a "regular" steamer) sailed from Savannah, Georgia, to Charleston, South Carolina, with liquors on board. This schooner arrived at Charleston and tied

¹*People v. Hawkins*, 157 N. Y., 1.

up at the dock, *at night*. She was seized by the chief constable and libeled. The court held the statute to be void as a regulation of interstate commerce.²

In *Greek-American Co. v. Richardson*, 124 Wis., 469; 109 Amer. State Rep., 961, it appeared that the Richardson Drug Company, an Illinois corporation, doing business at *Chicago*, sold a bale of sponges to the Greek-American Co., of *Milwaukee, Wisconsin*, to be shipped from Chicago to Milwaukee, under a contract (made at Chicago) to the effect that when the sponges were delivered to the purchaser at Milwaukee, they might be rejected, if not satisfactory.

The sponges were shipped and accepted. The seller brought suit to recover the price.

The defense was that the seller was a foreign corporation which had not complied with the laws of Wisconsin, prescribing the terms on which foreign corporations could do business in Wisconsin, and which laws forbade recovery on contracts made without having first complied with the statute.

The Court held that the transaction was one of interstate commerce, and that the State statute was invalid as a regulation of interstate commerce, if applied to such contracts.

The seller was given his judgment.

²*Jerver v. "The Carolina,"* 66 Fed. Rep., 1013.

This case is valuable as an illustration of the rule that when a transaction *is* interstate commerce, State statutes "regulating" it—that is, prescribing the rights and duties of the parties with respect to it—are inapplicable or void.

The case of *Rearick v. Pennsylvania*, 203 U. S., 507, heretofore mentioned on page 42 hereof, is also in point.

The latest treatise upon the police power is by Professor Freund. After discussing the Federal Anti-Trust Laws, he says that a State—

"cannot prevent an industrial *trust* organized in another State from coming into its territory for the purpose of selling its products to be sent from the State where they are manufactured.

"*Probably* a State cannot even prevent its own citizens from combining in its own territory to restrain competition in the importation of goods from outside of the State, although prohibitions to that effect are found in the anti-trust laws of several States." (Referring to Arkansas, Minnesota, Montana, Tennessee, and Utah.)*

However, it is not necessary to insist upon that principle in the present case.

It will be no answer to suggest that the conspiracy violated *both* the State and the Federal statutes. *They* cover

*Freund's Police Power, sec. 342.

different fields. The statutes of both jurisdictions, it is true, relate to contracts and agreements in restraint of "commerce," but one relates to interstate commerce, and the other to intra-state commerce. A criminal conspiracy may affect both commerces directly or indirectly, but it can violate the statute of only one jurisdiction, in a justiciable sense.³

The Supreme Court of Tennessee in the present case recognized this, and accordingly held that the alleged conspiracy related to *inter-state commerce indirectly*, merely. That Court said:

"The Legislature was cognizant, we must presume, that it had *no power* to enact laws regulating *inter-state commerce*, and did not intend to enact an unconstitutional law, in whole or in part. There was already then in force an act of Congress, the Sherman Anti-Trust Act, enacted in 1890, *fully covering that subject*, the provisions of which were broader and more effective than those of this act, and could be enforced to their fullest extent by the stronger and more vigorous government. There was neither the power nor the necessity for enacting any legislation relative to interstate commerce. The wrongs to trade which were intended to be corrected and punished, were those being perpetrated against commerce *within* the

³Prentice & Egan, Commerce Clause, Fed. Const., p. 336; *Prigg v. Penna.*, 16 Pet., 539, 617; *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 229, 230.

State, which Congress could not reach, and for which there was then no efficient remedy.”⁴

It is to be constantly borne in mind that the question is *not* whether this Tennessee *statute* (Ch. 140, Acts 1903) is invalid because it regulates interstate commerce, but it is this: Is the conspiracy *agreement* a violation of the Federal statute, or of the State statute? There is a Federal statute which makes criminal, all combinations in restraint of interstate trade, and there is a State statute which makes criminal all combinations in restraint of intra-state trade. It is not a question whether the State *statute* infringes on the Federal *statute*. The question is whether an *agreement* which this Court denounced in Holt's case and in this case as criminal, is an offense against the one statute *or* the other.

Undeniably this agreement, in a *general* sense, remotely “affects” all commerce or trade, and therefore in a *latitudinarian* sense may be said to offend both the State and Federal statutes. This may be said of almost all agreements affecting the sale of merchandise. But while this is true, in a latitudinarian sense, it is *not* true in the *legal* sense. In *law*, in order to the administration of justice and to the delimitation as far as possible of the jurisdictional boundaries of the State and Federal governments, *commerce*, in all cases, will be adjudged to be either *intra-state* or *interstate* commerce—one *or* the other, but *not*

⁴Opinion, Record, pp. 524, 525.

both. And so it must be that every conspiracy against trade and commerce, is to be adjudged an offense against either inter-state or intra-state commerce, one or the other, but not an offense against both.

To do this, the courts have distinguished between "direct," or "indirect and remote" effects. An examination of the cases reveals that the courts have probably adopted this nomenclature for lack of better terms. There is no pronounced line of demarkation between inter-state commerce and intra-state commerce. It is for that reason the State Court said that a combination which affects inter-state commerce is *nonetheless* an offense against Federal law, "and punishable under it," because it also "incidentally" affects intra-state commerce.

The contract condemned by the Federal statute is "one whose *direct and immediate effect*, is a restraint upon that kind of trade or commerce which is interstate." . . .

There must be some *direct and immediate* effect upon interstate commerce to come within the act⁵ "There must be, so to speak, a *privity* between the *manifestation* of the power, and the *resulting* burden."⁶

This last was said with reference to a State *statute*, but the principle is the same as to *agreements*.

⁵*Hopkins v. United States*, 171 U. S., 592.

⁶*Northern Security Co. v. United States*, 193 U. S., 394; White, J., dissenting.

In *Cincinnati Packet Co. v. Bay*, 200 U. S., 179, the question was whether a certain agreement violated the Federal law. The Court said that it did not; that “the *chief and visible* object of its *provisions* has nothing to do with interstate commerce.”⁷

Speaking of a *tax* in a tax-case, this Court said that neither the State Court, nor the State Legislature by giving the tax a particular *name*, or by the use of some *form* of words, can take away the Court’s duty to consider the *nature and effect* of the tax. “If it bears upon commerce among the States so directly as to amount to a regulation in a *relatively immediate* way, it will not be saved by name or form.”*

Tried by this rule, the Holt-Love-Cron agreement (if criminal) is an offense against *Federal* law, because the *Rosemon-Love-Cron* contracts which it *hit* and was *meant* to destroy, and which it did destroy, undeniably were of an interstate commerce character. The *competition* with oil *about to be imported*, and against which it sought to “protect” the Standard Oil Company’s oil, then “at rest,” was of an interstate character. The State Court admitted that an agreement which *directly* affects interstate commerce, is none the less an offense against Federal law, and punishable *thereunder*, because it “indirectly” affects interstate commerce also†

⁷200 U. S., 184.

**Galveston, etc., Ry. v. Texas*, 210 U. S., 217, 227.

†117 Tenn., 647.

Suppose that the importation of oil by the Evansville Oil Company was "*the occasion, the incentive, of the conspiracy,*"⁸ surely it is inexact to say that *this* fact must make the *agreement* one which "directly affects intra-state commerce! An agreement whose purpose and effect is to prevent the *importation* of oil from another State (which is in itself interstate commerce) is *necessarily* leveled at and relates to interstate commerce, instead of intra-state commerce. Finally, it is to be said that the agreement itself *in terms* related alone to interstate commerce: That was its "chief and visible object."

The Attorney General in his brief maintains that the meaning *and application* of a State statute is to be determined by the decision of the State Court.⁹ For this he cites *Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28, 42; *Leeper v. Texas*, 139 U. S., 462, 467; *Smiley v. Kansas*, 196 U. S., 447, 455. But these cases neither announce nor sustain such doctrine. Many cases are to be found which hold that the *interpretation* placed upon a State statute by its highest court will be accepted by this court as correct, but they have not conceded that the *application* which a State Court makes to the facts is binding on this Court. The rule is otherwise, as already shown. If the *judgment* in the case denies a Federal right, this Court will correct it.[†]

⁸117 Tenn., 647.

⁹Brief, p. 31.

[†]*C., B. & Q. Railway v. Drainage Commr's*, 200 U. S., 580.

The mere *construction* of a State statute does not of itself present a Federal question; but when a statute, as construed by a State Court, is *applied* by that Court to a transaction, or offense, really *within* the operation of *Federal* laws, a Federal question *is* presented; and for the reason that there is then a question as to the *relation* between the Federal Constitution or statute which rightfully applies to and controls the act, or transaction, or offense, and the State statute which the State Court by its judgment, applies to that transaction or offense.‡

To meet this the Attorney General is constrained to *claim* that the transactions complained of are *intra-state* transactions.* But they are *not*, as we think we have shown.

We concede that the Tennessee statute as construed by the Supreme Court of the State in Holt's case, applies and relates to conspiracies against intra-state commerce alone, and that this Court is bound by that construction. The question here is not one of the *construction* of that statute, but of its *application*.

By the decree now complained of, the Supreme Court of Tennessee has seized upon an *inter-state* commerce transaction, and declared it to be an *intra-state* one, *so as to bring it within the operation of the State statute*. The Appellant's rights were invaded, not by the *interpretation*

‡*Knop v. Monongahela Coal Co.*, 211 U. S., 488.

*Brief, pp. 42, 43.

placed upon the Tennessee statute, but by the *application* which the Court has made of that statute to an *inter-state* transaction.

The Fourteenth Amendment relates to *all* State actions—legislative, judicial and executive.⁹ It means that no agency of a State, executive, legislative, or judicial, can deny due process of law, or the equal protection of the laws.¹

It is mere verbal jugglery to *say* that a State *statute* has no application whatever to interstate commerce, and at the same time hold that a pure interstate commerce *transaction* is an intra-state one, so as to bring it within that statute. The decree interpreting a statute and applying it must be considered as a whole.² It is not merely a question of the State Court's *interpretation* of a statute. It is the question of the *application* of that statute to interstate commerce, and the determination and decision of a *case*. This Court announced in *General Oil Company v. Crain*, 209 U. S., 228, that a party is entitled "to be protected against a State law which violates a constitutional right, whether such violation be wrought by the terms of the statute, or *in the manner of its enforcement*." In both cases alike

⁹207 U. S., 36.

¹*Ex parte Virginia*, 100 U. S., 339; Guthrie, Fourteenth Amendment, 2; McGhee, Due Process of Law, 27.

²*Lowe v. Lawler*, 208 U. S., 299.

such decision gives effect to the statute, and it is therefore reviewable by this Court.³

An act of the Legislature may be unconstitutional and void. A legal wrong is done to a man who is accused and convicted under such an act.

An act of the Legislature may be constitutional and valid, and still a legal wrong may be done to a man who is accused and convicted under it. For example, a man may in point of fact be put on trial and convicted a second time under a valid or constitutional act for the same offense. The legal wrong and injury is the same in both cases. The wrong is the same whether an accused person be convicted and punished under an unconstitutional statute, or he be convicted and punished in *violation* of the constitution, under a *valid* statute. The Court really has no jurisdiction in either case.*

When a Federal question is really *not* involved in a case, the fact that the *State* Court *holds* that it is, and considers and decides it, will not oblige this Court to take jurisdiction of the case. It will refuse to do so, notwithstanding the State Court's decision.⁴

Where the State Court decided that a certain contract was *not* a maritime contract, and therefore that the remedy

³209 U. S., 228.

*Hans Neilson, Petitioner, 131 U. S., 183.

⁴*Elder v. Colorado*, 204 U. S., 585.

given by a lien-law of the State, did not conflict with the Constitution of the United States, *this* Court held that it was for *it* to determine ultimately whether the contract was a maritime one or not, and whether there was any conflict.⁵

This Court will not permit its jurisdiction to be cut off from the determination of a Federal question in a case where that question has been *attempted to be avoided* by the State Court, or has actually *been avoided* by an *unreasonable construction* of a contract, or of pleadings, or of facts.⁶

“Neither the State Court nor the Legislatures, by giving the tax a particular *name*, or by the use of some *form* of words can take away our duty to consider its nature and effect”—that is, the nature and effect of the “tax” imposed. If it bears upon commerce among the States so directly, as to *amount* to a regulation in a *relatively immediate way*, it will not be saved by name or *form*.”⁷

A State Court may be capricious and unreasonable in the *interpretation* of the State statutes, and preclude this Court from considering and determining Federal questions, so far as that can be accomplished by placing an interpretation upon State *statutes*. But that is the limit. This Court is not concluded by the rulings of the State Court

⁵*Edwards v. Elliott*, 21 Wall., 550.

⁶*Vandalia R. R. v. South Bend*, 207 U. S., 367.

⁷*Galveston, etc., Ry. v. Texas*, 210 U. S., 217, 227.

with respect to Federal questions beyond that of the *interpretation* to be placed upon the State statute involved. It will always determine for itself whether any Federal question is involved which will entitle it to review the judgment of the State Court.⁸

Where the State Court so construes a State statute as to impose a "tax" within the meaning of the Federal Bankruptcy Act, this Court held that such ruling did not make it so in fact; and the Court considered the question *de novo*, for the reason that although the question involved the construction of a State statute, yet it also involved, *in its application*, a Federal statute.⁹

Of course when the assertion of a Federal question is *frivolous* and without *color* of merit, this Court will not exercise jurisdiction.¹ But when it is not frivolous the jurisdiction exists. Jurisdiction does not depend upon the fact that the Federal question must be ultimately decided in favor of the Appellant.

The Federal questions in this case were made in the pleadings, and in the assignment of errors, and in the petition for rehearing, and in the brief. It was not possible

⁸*Vandalia R. R. v. South Bend*, 207 U. S., 367; *Sullivan v. Texas*, 207 U. S., 423.

⁹*New Jersey v. Anderson*, 203 U. S., 491.

¹*Otis v. Ludlow*, 201 U. S., 140, 150; *Sullivan v. Texas*, 207, 422.

for the Supreme Court of Tennessee to decide as it did decide, without overruling or ignoring them.²

Consequently the rule is that when there is a Federal question adequate for the exercise of jurisdiction by this Court (of which *it* is always to be the judge) the Court acquires jurisdiction, not merely of the decision of the Federal *question*, but over the *whole case*; and it will open up and review the *whole case* when it is a case *in equity*, and *not* one which has been tried by a jury in a court of *law*.³

It is not necessary for us to contend that the *whole case* shall be gone into. Upon the contrary, we have taken the facts to be as the Supreme Court of Tennessee found them. Our contention merely is that when the case is finally heard, it will be open to the Defendant to show that the evidence established that it (the corporation) did not engage in the "conspiracy," was ignorant of what its agent did, and disavowed and condemned the act promptly upon discovery.

²*Otis v. Ludlow*, 201 U. S., 140, 150; *Sullivan v. Texas*, 207 U. S., 422.

³*Burton v. United States*, 196 U. S., 295; *Horner v. United States*, 143 U. S., 570; *Holder v. Aultman*, 106 U. S., 89; *Williamson v. United States*, 207 U. S., 425; *New Jersey v. Anderson*, 203 U. S., 423.

This brings us to the second Federal question in the case.

SECOND PROPOSITION.

THE ANTI-TRUST ACT OF TENNESSEE UPON WHICH THE PRESENT PROCEEDING IS BASED IS VOID, BECAUSE IT DENIES TO THE DEFENDANT, THE STANDARD OIL COMPANY, THE EQUAL PROTECTION OF THE LAWS.

The Anti-Trust Act of Tennessee, Chapter 140, Acts 1903, upon which the present proceeding is based, is a general criminal law that relates to persons and corporations alike.

The only distinction it makes between them is in the punishment prescribed for its violation (117, Tenn, 664). It does not provide for proceedings against corporations for distinctive corporate wrongs—for some sin against the laws of their corporate being. Neither does it provide for proceedings against foreign corporations for failing to comply with the prescribing conditions on which such corporations are admitted to the State and permitted to do business.

As a general criminal law, it forbids conspiracies against trade, and provides for the punishment of all persons, domestic corporations and foreign corporations that violate its terms.

We are frequently able to more clearly understand what a case is, through a clear perception of what it is not. The present case ought not to be a proceeding against a corporation, *as a corporation*, but as a criminal. It is *not* a proceeding to reach a corporation because it has committed some offense which *only* corporations can commit. Upon the contrary, it is a proceeding to *punish* a corporation for the violation of a *general criminal law*—the violation of a law which is *leveled* at natural and artificial persons *alike*, and to punish for an offense which persons and corporations can commit equally and alike. The only difference in the eye of this *general law*, between persons and corporations is “in the *punishment* provided.”*

The present case is *not* a proceeding against a foreign corporation for failing to comply with the laws of Tennessee prescribing the *conditions* on which foreign corporations are admitted to the State, and permitted to do business. It is not even contended that it is. The bill expressly avers, and thereby concedes, that the Defendant Company filed a copy of its charter with the Secretary of State on the 21st day of September, 1893, and ever since that time has been claiming the right to do, and has been doing, business in Tennessee.¹

The bill also avers and charges that the Defendant has “violated” the provisions of section 1 of chapter 140 of

*117 Tenn., 664.

¹Record, p. 1.

the Acts of Tennessee of 1903, and that it (the bill) "*is brought by the Complainant through her Attorney General, as aforesaid, in order that the punishment of such violation prescribed by section 2 of said Act may be imposed upon said Defendant Company.*"²

On the hearing before the Supreme Court of Tennessee, the Attorney General for the State endeavored to destroy the complexion which the case *has* by reason of the setting which was given to it by him in the *pleadings*, and to give the case an altogether different hue. To that end, in the brief filed in that Court, he *in substance*, said that:

"Foreign corporations do business in Tennessee by comity, not by right, and that they can be excluded absolutely in the first instance, or permission once given can be withdrawn at the pleasure of the State; and that the revocation of such permission, is not the infliction of a penalty, nor punishment, in a legal sense.[†]

"The punishment inflicted by the statute should be denominated 'a statute liability,'[‡] and this suit should be *regarded* as having been instituted for the purpose of making a 'judicial record' of the fact that for violating the provisions of the act the Defendant 'is denied' the right to do business in the State, and also for the purpose of *enforcing* such 'denial' by the injunctive process of the Court.³

²Record, p. 4.

[†]Record, p. 491.

[‡]Record, pp. 488, 489.

³Record, p. 491.

That argument of the Attorney General seems to have proceeded upon the assumption that dainty terms can change the substance of things; that to *call* a judgment pronouncing the Defendant guilty of the violation of a general criminal statute, and imposing the punishment prescribed by that statute, based upon pleadings which aver that the bill was brought to inflict the punishment imposed by the statute—that to *call* that judgment a mere “judicial record” of the fact that a “denial” of the right to do business had been made, a “statute liability” because the Defendant had been guilty of violating the provisions of the act, *operates* to convert the bill, into a mere “*revocation*” of the license previously granted to do business in Tennessee.

But the Supreme Court of Tennessee said:

“We have assumed that foreign corporations doing business in the State are entitled to the same status and rights as domestic corporations; and in truth, they *are* so entitled under the Act in question, Chapter 140, Acts 1903, in respect of proceedings to stop them from doing business here, and it seems from the authorities cited, that they have been treated with the same consideration in other States.” (Record, p. 523.)

True, the Court adds:

“It is well to remember and to remark that they (*foreign corporations*) have no contract rights with the State; they are here merely on sufferance, guests, as it were, of the State, and have no right to complain

of the procedure which the State has adopted to try the question whether they have *abused the courtesy* shown them, and have thereby forfeited a continuance of it. That the power exists in the State to otherwise deal with them is shown and illustrated in *Insurance Company v. Craig*, 106 Tenn., 621, 641, wherein the Court sanctioned the provision in the Insurance Laws of the State giving power to the Insurance Commissioner, *without* proceedings in the ordinary courts, to exclude foreign insurance companies for certain violations of law after they had obtained a license to do business here." (Record, p. 523.)

As will be seen, the opinion of the State Court rests the case, *in substance*, upon the following proposition, namely:

"*Quo warranto*, and its substitute (bill in equity upon relation) are *civil* proceedings. They have always been used to correct *corporate* abuses. They are also employed to oust foreign corporations, as well as to dissolve domestic ones. For that reason, when the statute (as this statute does), imposes expulsion or ouster, and dissolution, as the *punishment* for its violation on the part of *corporations*, it has the right to provide that the *procedure* which has always been employed to correct *corporate* abuses, may be used to *punish* for violations of *this statute*. As that procedure is a *civil* proceeding, and *not* a criminal proceeding, the *defensive rights* which persons and corporations enjoy, when proceeded against *criminally*, do *not* exist here. Foreign corporations have the same status, and rights, that domestic corporations have, under this Act, but *neither* of them has the *defensive*

rights that persons have, *because they* can be proceeded against in *civil* proceedings where no such rights exist, while *persons* must be proceeded against by *criminal* procedure where all such defensive rights are enjoyed.

“However, it ‘is well to remember, and to remark’ that foreign corporations are mere ‘guests’ of the State, doing business by courtesy, and therefore can have no *right* to complain of the procedure which the State adopts (whatever it may be) to try the question whether they have abused that courtesy and thereby forfeited a continuance of it. For this last reason we *could* have affirmed the decree of the Court below; but have seen proper to place our decree of affirmations upon the ground *first* stated, namely, that the proceeding described is a *civil* proceeding, and being a *civil* proceeding, the *defensive rights* contended for *cannot* be enjoyed.”

State v. Craig, 106 Tenn., 621, cited by the State Court, was a case involving legislation relating to foreign *insurance* companies. It was held that the Insurance Laws of Tennessee conferred upon the Insurance Commissioner of the State, *exclusive and final* authority to grant or refuse permission for an *insurance* company to do business in Tennessee, in the first instance, to withdraw that permission after it had been granted, and to revoke certificates of authority after issuance.⁵

Undeniably, *if* it be true that the laws, under which

⁵106 Tenn., 634.

foreign *insurance* companies are permitted to enter Tennessee, and do business therein, confer *exclusive* and absolute authority upon a Commissioner to say whether the companies may enter the State or not, and, being in, to say whether and when they shall depart—if such be the conditions of admission, insurance companies can have no relief in the courts from his judgment. If the statute provided, as the Court in *that* case said it did, that the insurance company could not do a certain thing, and that the Insurance Commissioner of Tennessee should be the exclusive and final judge of the question of guilt; that is, of whether it had done that thing or not; and *if* it provided that it was a *condition* of admission that *his* judgment should be *final* and conclusive, undeniably the company was without redress. In such case the company would not only be a “guest, as it were” of the State, at the pleasure of the State, but at the pleasure of the State’s butler, at that.

It cannot be successfully contended (we submit) that foreign *trading* corporations have such a status in Tennessee as that. It cannot be successfully contended with respect to *trading* corporations, that it *was* a *condition* of their admission to Tennessee that a *civil* procedure in which all “defensive” rights are denied should be the procedure used to *punish* such corporations for the violation of the State’s general *criminal* laws. The most that can fairly be maintained in that respect is, that inasmuch as it is provided in this Anti-Trust Act that a *civil* proceeding shall

be used to punish corporations for violating the provisions of that act, and inasmuch as the offense is a violation of, and disregard for, a law, the statute *ought* to be construed to be one *prescribing conditions of admission*, rather than be construed to be one for *'punishing* the violation of a *general law*, even though such law was enacted ten years after the corporation had been admitted.

If it be conceded, for argument, that it is within the power of the Legislature to enact that all foreign corporations, *already* lawfully doing business in the State, shall be regarded as mere guests of the State, and that strict observance of all *general criminal* laws shall be a *condition* of the right to remain, and that the question of such observance shall be determined, *exclusively* and finally, by some *civil* proceeding, in which the usual *defensive rights* shall be *denied*, it must surely be acknowledged that *before* a statute, which it is *claimed* does this, *should* be construed to do it, its meaning should be explicit and clear. Before a *subsequently* enacted statute, which is a *general criminal law*, applicable to persons *and* corporations alike, should be *construed* to mean that foreign corporations already lawfully doing business in the State, may be declared to have forfeited that right, *without* the right of a *full and fair trial*, and thereby be denied the equal protection of the laws, that construction should be plain and clear beyond any sort of a doubt.

We believe, and therefore may concede, that a State may, according to its own pleasure, proceed in either of one

or two ways: (1) it may make a conspiracy against trade, an offense by a general criminal law, and it may punish that offense, and that punishment may be a fine or forfeiture, dissolution (or ouster), or both; (2) *Or*, it may make it a *condition* of admission, that a foreign corporation shall, by coming into the State, thereby agree not to engage in a conspiracy against trade, denounced by a general criminal law, and be ousted from the State, by a *civil* proceeding, if it does, in which the usual *defensive rights* shall *not* be enjoyed.

Obviously, it is one thing to exclude foreign corporations unless they conform to certain prescribed *conditions* of admission, and quite another thing to subject them, after they have complied with the conditions, to general statutory laws. While it may be allowable for the State to proceed either way, yet, we repeat, that if a general criminal law is meant to prescribe *conditions* of admission, rather than *punishment* for violation of its provisions, it should clearly and unmistakably appear. If the policy of the State does not permit the business of a foreign corporation within its limits, it ought to be expressed in some affirmative and unmistakable way.

In *Carroll v. Greenwich Ins. Co.*, 199 U. S., 409, this Court said:

“We assume for purposes of decision, that the bill means that the auditor threatens and intends to enforce the act in case the Plaintiffs do what they desire to do, and that if section 1754 is contrary to the Con-

stitution of the United States, a proper case for an injunction is made out. We assume, further, that the position of the Plaintiffs is not affected by the fact that they are foreign corporations. The act is in general terms and hits all insurance companies. If it is invalid as to some, it is invalid as to all. That the requirements of the act *might* have been made *conditions* to foreign corporations doing business in the State is immaterial, since as we understand the statute, the Legislature did *not* attempt to reach the result in that way. *A company lawfully doing business in the State is no more bound by a general unconstitutional enactment, than a citizen of the State.*"

In *Fidelity Mutual Life Assurance Ass'n v. Mettier*, 185 U. S., 332, Justices Harlan and Brown, in the dissenting opinion, said:

"It is *one* thing for a State to forbid a particular foreign corporation, or a particular class of foreign corporations from doing business at all within its limits. It is quite *another* thing for a State to admit or license foreign corporations to do business within its limits and *then* subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation doing business in Texas under its license, or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States, and cannot therefore be enforced against it, the State need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a *condition* of the right of the corporation to do business in the State, and whether constitutional or not,

must be respected by the corporation. Corporations created by the several States are necessary to the conduct of the business of the country; and it is a startling proposition that the State may permit a corporation to do business within its limits, and by *that* act acquire the right to subject the corporation to regulations that may be *inconsistent* with the supreme law of the land.”⁶

In *W. W. Cargill v. Minnesota*, 180 U. S., 468, the Court said:

“The Defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and *if* it obtained the required license, it would be held *to have accepted* all of its provisions, and (in the words of the statute) ‘thereby to have *agreed* to comply with the same.’ The answer to this suggestion is, that the acceptance of the license in whatever form, will not impose upon the licensee an obligation to respect or comply with any provisions of the statute, or with any regulations prescribed by the State Railroad and Warehouse Commission that are *repugnant to the Constitution* of the United States. A license will give the Defendants full authority to carry on its business in accordance with the *valid* laws of the State, and the *valid* rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke the one granted, because the appli-

⁶We do not think the majority opinion rejects the distinction made in the dissenting opinion, and cite it only for a clear statement of the distinction.

cant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations *inconsistent* with the Constitution of the United States, the rights of the applicant, or the licensee *could* be protected and enforced by appropriate judicial proceedings."

In *American Smelting & Refining Co. v. Colorado*, 204 U. S., 103, it appears that the laws of Colorado provided that foreign corporations should file with the Secretary of State a copy of the charter and pay a certain tax, and thereupon obtain a certificate, before they could do business in that State.

They further provided that upon so doing, the corporation should be subjected to all the liabilities, restrictions and duties which "are, or may be," imposed upon *domestic* corporations.

The Smelting Company complied with the laws, paid the tax, received a certificate, established itself, and began to do business.

Thereafter, and while the corporation was doing business in Colorado, a *new* law was passed imposing a certain annual tax on *domestic* corporations, and an annual tax of *twice* that amount on *foreign* corporations "*as a condition precedent*" to the right to do business.

The Smelting Company denied liability for this tax. Thereupon the Attorney General of the State instituted proceedings in the nature of *quo warranto* to oust it.

The State Court held that the Company was liable, and decreed accordingly; but this Court held that by complying with the original statute, a *contract* was entered into which could not be impaired by subsequent legislation. The contract thus entered into was this: that the Smelting Company had the right, so long as it obeyed the *general* laws, to do business in the State for twenty years (the life of domestic corporations), without being subject to other or different taxes than those imposed at any given time upon domestic corporations.

It will be observed that the latter law *expressly* provided that the corporation should be subject to all the restrictions and duties that "are, or may be," imposed upon domestic corporations, as a condition precedent to the right to do business.

The Supreme Court of Tennessee *really* has not attempted to depart from the construction it placed on this Act in *Standard Oil Co. v. State*, 117 Tenn., 664, wherein it said that:

"Corporations are *forbidden* by the statute from making the agreements prohibited, and punishment imposed upon them and their officers and agents acting for them in effecting and carrying it into execution when found guilty. The *only distinction* made in the statute between natural persons and corporations violating its provisions, is in the *punishment*

provided. The Legislature had the power to enact that *corporations* could commit and *be guilty* of this *offense*, and has done so.”

The present bill is based on that case. It was not brought to assert a civil right, but to inflict the *punishment* imposed by a general criminal law. After charging that the Appellant “violated” the statute, the bill avers that:

“This bill is brought by the Complainant through her Attorney General as aforesaid, in order that the *punishment* of such violation prescribed by section 2 of said Act, may be *imposed* upon said Defendant Company, towit: That said Defendant Company be denied the right to do and be prohibited from doing business in this State.” (Rec., p. 4.)

The Attorney General sought on the trial in the State Court to have another construction of the Act. But no amount of *phrasing* can alter the fact that it is *punishment* which is inflicted, and that the bill was filed to have the punishment prescribed by that general law inflicted upon the Defendant *as an offender*.

And the Court decided in the present case that ouster is inflicted by the Act, as a *punishment* upon offending corporations, for it said:

“Now was it competent for the Legislature to provide a civil remedy against corporations, and a criminal remedy against natural persons? Is there any good reason for the discrimination? It seems that there is a good reason in the fact that it is impossible

to *punish* corporations by imprisonment, which can be inflicted only on natural persons. . . . The *punishment* inflicted upon the corporation is one peculiar to corporations, and is inflicted in the same manner in which this form of *correction* has been applied to corporations ever since there has been any public redress at all in this State for *corporate* wrongs, and is the same in substance which has been applied by English-speaking people for a time which the memory of man runneth not to the contrary.”⁷

⁷Trans., p. 522.

This Court deals with substance, not merely with phrases and names.

In dealing with constitutional provisions affecting personal and property rights, this Court construes them broadly, and not in a technical way. To illustrate: In *Ex parte Garland*, 4 Wallace, 333, it appeared that Mr. Garland, of Arkansas, had been admitted to practice in the Supreme Court of the United States in 1860, and, of course, had then taken an oath to support the Constitution of the United States. During the Civil War he entered the Confederate service. In 1865 Congress passed an Act to the effect that no person should be allowed to practice in the Federal Courts without making oath that he had not voluntarily borne arms against the United States. Mr. Garland, of course, could not take that oath. The President *pardoned* Mr. Garland for all offenses as a rebel. He presented this pardon, and asked to be permitted to practice in the Supreme Court without taking the oath, in 1865.

The application was resisted on the ground that while the pardon protected him from punishment for what he had done as a *rebel* during the war, the oath was another matter—that it regulated and prescribed the *qualification* of members of the *bar*, and therefore was not covered by the pardon. But this Court held that the pardon operated to relieve him from taking the new oath. Mr. Justice Fields said:

“As the oath prescribed cannot be taken by these parties, the Act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions, or any of the ordinary vocations of life for past conduct can be regarded in no other light than as *punishment* for such conduct.” (4 Wallace, 377.)

In 4 Wallace, 320, the Court also said:

“We do not agree with the counsel of Missouri that ‘to *punish* one, is to deprive him of life, liberty, or property, and that to take from him anything *less* than these, is *not* punishment at all.’ The *deprivation of any rights, civil or political*, previously enjoyed may be *punishment*, the circumstances attending and the causes of the deprivation determining the fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. *Disqualification from pursuits of a lawful avocation*, or from positions of trust, or from the privilege of appearing in the Courts, or acting as executor, administrator, or guardian, may also, and often has been, imposed as *punishment*.” . . .

“And exclusion from any of the professions, or any of the ordinary *avocations of life* for past conduct,

can be regarded in no other light than as *punishment for such conduct.*" . . .

The statute under consideration in that case (4 Wall., 320), requiring an oath, which those who had taken part in the war between the States could not take, was sought to be sustained upon the ground that it was merely prescribing a *qualification* for attorneys-at-law—merely prescribing the oath which those wishing to appear as practitioners could take, and that it could be sustained on this ground. But the Court said that the question was not as to the *power* of Congress to prescribe the qualifications of attorneys, but *whether* that power had been *exercised as a means for the infliction of punishment*. It held that it was exercised as a means for the infliction of *punishment*, and was prohibited by the Constitution.

Mr. Jefferson Davis was indicted at Richmond, Va., for treason during the Civil War. While the indictment was pending, the Fourteenth Amendment to the Constitution was adopted. Among other things, it provides that no one who had previously taken an oath to support the Constitution of the United States as a Senator or member of Congress, and thereafter engaged in the rebellion, should be eligible to be a Senator or Representative in Congress, or to hold any office. Mr. Davis had been a Senator before the war. Mr. Davis' counsel moved to quash the indictment on the ground that when the Fourteenth Amendment prescribed this *particular* disqualification, it in effect relieved from *all other* penalties and disqualifications; that

by inflicting this particular punishment for having engaged in the rebellion, by *implication*, all other forms of punishment were forbidden. The question was argued by such lawyers as Mr. O'Connor and Mr. Evarts. Chief Justice Chase, who sat in the case, and District Judge Underwood divided in opinion and so the question was certified to the Supreme Court. *But the Chief Justice was of the opinion that the motion was well taken and that the indictment should be quashed.*⁹

In *Coffey v. Harlan County*, 204 U. S., 659, it appears that a statute of Nebraska provided that any public officer guilty of embezzlement of public money should be imprisoned in the penitentiary, and pay a fine equal to double the amount he had embezzled, the fine to operate as a judgment, for which execution should issue, for the use of the persons whose money had been embezzled. It appears further than one Whitney was treasurer of Harlan County, Nebraska, and that he embezzled \$11,190. He was found guilty, sentenced to imprisonment, and to "pay a fine in the sum of \$22,380, double the amount of the embezzlement." The Court held that it was immaterial whether he had made restitution in whole or in part, and that it was not important what the *penalty* was *called*, inasmuch as it came to him *as the result of his crime.*⁸

In the course of the opinion in that case, Mr. Justice Moody said:

⁹4 Fed. Case No. 3621a.

⁸204 U. S., 664.

“As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine is *called* a penalty, a punishment, or a civil judgment. Whatever it is *called*, it comes to the convict as the *result* of his crime.”

In *United States v. Chouteau*, 102 U. S., 611, it appeared that a law of the Congress (Rev. Stat., sec. 3296) provided that any one who removed distilled spirits from a bonded warehouse, on which the tax had not been paid, should be liable to a *penalty* of double the tax unpaid, and be subject to a fine, and to imprisonment.

Chouteau was indicted for unlawful removal, and a *civil* suit was also brought to recover double the tax. The criminal case was compromised. The Government accepted one thousand dollars in full satisfaction and compromise of the “indictment and prosecutions;” and they were dismissed.

He pleaded that compromise as a defense to the civil suit, and the plea was sustained. Mr. Justice Field said:

“Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still a *punishment* for the infraction of the law. The term “penalty” involves the idea of punishment, and its *character* is not changed by the *mode* in which it is inflicted, *whether by a civil* action or criminal prosecution.” (102 U. S., 611.)

In *Sevier v. The Justices*, Peek. (Tenn.), 334, it appears that under the laws then in force in Tennessee, a County Court Clerk who failed to make certain reports, and to pay over certain revenues collected by him, as required, might be removed by the Justices of the County Court, and should not be eligible for re-election for ten years.

Sevier, the Clerk of the County Court of Washington County, was removed by the Justices. That action, or judgment of removal was set aside by the Supreme Court for irregularities. But there were two things held in the case, namely: (1) that the Justices of the County Court could, upon proper notice, summarily remove the clerk for delinquencies of the character charged; (2) but he could be made ineligible for ten years, *only after* indictment or presentment and conviction by a jury, because *that* came as *punishment*. The right of *summary removal* is necessary in order to protect the State and the public from unfaithful and dishonest clerks; but *punishment* for the offense, because of which the offender was summarily removed from a public office, must come, or be inflicted in the regular way.

No narrow view was taken of the question in any of the cases. No narrow view should be taken here. When the Anti-Trust Act of 1903 makes it "a conspiracy against trade" to enter into an agreement of a certain character, and punishes *persons* who are guilty by fine and imprisonment, and *corporations* that are guilty by dissolution or

ouster, the *offense*, so far as corporations are concerned, must be regarded as a criminal offense, and the charge as a criminal charge, the same as in the case of natural persons. A corporation cannot be imprisoned in the penitentiary, but it can be fined. The Court below says that *if* a *fine* had been the punishment, this would have been a *criminal case*. (Rec., p. 522). The Legislature, however, preferred to *punish* corporations for violating this act, by dissolution, or ouster, rather than by fine. That, however, does not alter the *nature* of the charge. It is a criminal charge, and the *punishment* comes, as stated by Mr. Justice Moody, *as the result of crime*.

For these reasons we maintain that this Anti-Trust Act of Tennessee is a *general criminal law*, and that it provides ouster as a *punishment*, and not as a *condition of doing business* in Tennessee.

We have discussed the proposition above stated at this length because it is desirable to have it settled that the Tennessee statute is a *general criminal law*, and not a statute prescribing the *conditions* on which foreign corporations are permitted to do business in Tennessee. *The Attorney General, it will be observed, has not even contended in his brief on this motion that the statute is one prescribing conditions of admission for foreign corporations.*

SECOND FEDERAL QUESTION RESTATED.

This Anti-Trust Act of Tennessee is void because it denies to corporations, put to answer the charge of violating its provisions, the equal protection of the laws, and denies that protection in these respects, namely: It accords to persons put to answer the charge of violating its provisions: (1) The right to have a preliminary investigation by a grand jury; (2) the right to be tried by a jury; (3) the right to have their guilt established beyond a reasonable doubt; (4) the right to interpose and plead the statute of limitations as a defense when the statute has run; (5) the right to have a trial according to the usage and rules of the criminal laws of the land.

It denies all these rights to accused corporations; and in the present case the statute of limitations had run and constituted a full defense.

The Fifth Amendment to the Constitution of the United States provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The language of the Constitution of Tennessee is that "no person shall, for the same offense, be twice put in jeopardy of life or limb."¹

This language was employed when it was well understood what had happened in times gone by to the lives and

¹Art. 1, Sec. 10.

limbs of persons accused and tried in England at common law. However, it was used to convey an idea far beyond, and in some respects different from, jeopardy to *life* and *limb*, merely. Nobody in America has been put in jeopardy of *limb*, even *once*, and therefore it is idle to declare that a man should not be put in jeopardy of "limb" *twice*. It is obvious that something beside "limb" was meant and intended.

And when it is said that no person shall be twice put in jeopardy of "*life*," more than *life* is intended. This constitutional clause protects a person from being put in jeopardy of his *liberty*, or property, as well as of his life, twice for the same criminal offense. A man cannot be put in jeopardy of his limb at all. He cannot be put in jeopardy of either life or liberty twice for the same offense. And by "offense" is not meant merely an offense for which a man could have been put in jeopardy of life or limb at the common law. It means that he cannot be put in jeopardy of life or liberty, or penalty, twice for the same offense, whether that offense be felony or a misdemeanor; whether it be punished by death, imprisonment in the penitentiary, imprisonment in jail, or by fine. It means that a man shall not be *punished* twice, for *any* kind of criminal offense.²

²*State v. Hornsby*, 8 Robinson (La.), 554, s. c. 41 Amer. Dec., 305, 311; *In re Snow*, 120 U. S., 274; *Neilson, Petitioner*, 131 U. S., 176; *Berkowitz v. U. S.*, 93 Fed. Rep., 452, 454 (C. C. A. third Cir.)

A corporation is a "man" and a "person" within the meaning of the Constitution.³

The words "jeopardy of life or limb," give the Constitutional provision an ancient common-law complexion, but, as shown, they have never been restricted to a literal meaning, either by this Court or the Supreme Court of Tennessee. However, in construing other and kindred clauses of the Constitution of that State, that Court has departed from the American principle of construction, and has ignored the principle that while our ancestors brought with them to America the general principles of the common law, they adopted *only that portion which was applicable* to their condition.⁴

The Constitution of Tennessee provides that "no person shall be put to answer any *criminal charge* but by presentment, indictment, or impeachment."⁵ Also that "the right of trial by jury shall be inviolate."⁶

It would seem that the words "criminal charge" as used in this Constitution ought to mean, and were used to mean,

³*Harbison v. Knox Iron Co.*, 103 Tenn., 429; *Ins. Co. v. Craig*, 106 Tenn., 624; *Duggett v. Ins. Co.*, 250; *Charlotte, etc., R. R. Co. v. Giles*, 142 U. S., 386; *Standard Oil Co. v. State*, 117 Tenn., 650.

⁴*Van Ness v. Packard*, 2 Peters, 144.

⁵Art. 1, Sec. 14.

⁶Art. 1, Sec. 6.

any offense, whether a felony or a misdemeanor. Such is the construction placed upon these same words by the Supreme Court of Arkansas in construing a clause of the Constitution of that State, identical with that of Tennessee.⁷ But the Supreme Court of Tennessee holds that a "criminal charge" within the meaning of Sec. 14, Art. 1, of the Constitution of that State, means a common-law *felony* only, and does not include a "misdemeanor," for the reason that the words, says the Court, "are to be taken as having been used in a technical sense."⁸ It was held in both of the cases last above cited that an accused person could be put to answer for a misdemeanor, without indictment or presentment. It was conceded in *McGinnis' Case* that for misdemeanors which were "gross and notorious," such as riots, batteries, libels, and other immoralities of an "atrocious" kind, the accused was put to answer at the common law by "information," and that in all such cases, though proceeded against by information, the accused was *entitled to be tried by a jury*.⁹ It has always been the practice, both in North Carolina and in Tennessee, to prosecute misdemeanors by indictment or presentment, and not by information,¹ and so ancient and uniform has been this practice, the Attorney General of Tennessee conceded

⁷ *Eason v. The State*, 11 Ark. (6 Eng.), 481, 482.

⁸ *McGinnis v. The State*, 9 Humph. (Tenn.), 48, 49;
State v. Sexton, 114 S. W. Rep., 494 (Tenn. 1908).

⁹ *McGinnis v. The State*, 9 Humph. (Tenn.), 48.

¹ *McGinnis v. The State*, 9 Humph. (Tenn.), 50. .

on the trial of this case in the State Supreme Court, that under Tennessee's system of jurisprudence "no other form of prosecution, of either felony or misdemeanor, is known, save by indictment or presentment."² But the Court said in *McGinnis' Case* that this settled practice "weighs nothing," because the object of the Constitutional provision was, not to forbid the prosecution of misdemeanors by indictment or presentment, but to require "felonies" to be so prosecuted.

Nevertheless, as will be perceived, although "gross misdemeanors," such as libels, batteries, etc., could be proceeded against by "information," the accused was nevertheless entitled to a *trial by jury*.³

Later (in 1869) in *Trigally v. Mayor, etc.*, 6 Coldw. (Tenn.), 382, it was held that persons accused of "small offenses," such as hunting, fishing, fowling, gaming, playing on the Lord's Day, swearing, drunkenness on Sunday, and the like, could be punished without trial by jury, or formal indictment or presentment, and by "summary and speedy and efficient proceedings," before a Justice of the Peace; and such seems to be the law in Tennessee now.⁴

It could readily be shown that a misdemeanor *is* a "criminal charge" within the contemplation of this clause of

²Attorney General's Brief, Trans., p. 487.

³*McGinnis v. The State*, 9 Humph. (Tenn.), 50.

⁴*State v. Sexton*, 114 S. W. Rep., 494 (Tenn., 1908.)

American Constitutions.⁵ It could also be shown that a felony at common law was an offense which resulted, upon conviction, in a *forfeiture* of lands and goods.⁶ Although death was usually inflicted, yet *punishment* did not enter into the true definition of a felony. It was a felony because of the *forfeiture*.⁷ Practically there never was any such thing as a common-law felony in the United States, because there has been no forfeiture of lands and goods for crime.⁸ If, however, the *punishment* inflicted upon the person be accepted as the true criterion, it follows that a felony at common law was an offense punishable by *death*, and it also follows that if a "criminal charge" is only such an offense as was punished by death at common law, an accused person in Tennessee can be put to answer all those offenses which were *not* punishable by death at common law, and which are now punished by imprisonment in the *penitentiary*, upon a criminal *information*, without indictment or presentment—so far as the *Constitution* is concerned. It follows that he has no *constitutional* right to demand that he be put to answer a criminal charge not punishable by death, or which was not punishable by death at the common law, by indictment or presentment. This,

⁵8 Amer. & Eng. Ency. Law, 279 (2d ed.); *Eason v. The State*, 11 Ark. (6 Eng.), 481, 482; *In re Shultz*, —Wright (Ohio), 280, 281; 2 Words & Phrases, 1741, 1736.

⁶8 Amer. & Eng. Ency. of Law, 280 (2d ed.).

⁷*Ib.*

⁸8 Amer. & Eng. Ency. Law, 280, Note 6 (2d ed.)

however, is not inconsistent with the proposition that under the *statutes* of Tennessee, no person can be put to answer any criminal charge, whether it be a felony or misdemeanor, otherwise than by indictment or presentment. An examination of the Statutes of Tennessee in force now, and at the time this Anti-Trust Statute was enacted, shows this to be true.

The Code of Tennessee provides that "The grand jury, after being impaneled and sworn, shall be charged by the Court,⁹ and that "violations of the following provisions are to be given in charge specially: (36) *for suppression of conspiracies and trusts.*"¹

Section 7059 of the Code is: "But a prosecutor is dispensed with, and the district attorney may file bills of indictment, officially, and without a prosecutor marked on the same, in the following cases:" . . . Sub-sec. 23: "*Upon a charge of violating the law against conspiracies and the formation of trusts.*"²

Section 6949 of the Code is as follows: "All violations of the criminal law may be prosecuted by indictment or presentment by the grand jury, and a presentment may be made upon the information of any one of the grand jury."³

⁹Shann. Code, sec. 7035.

¹Shann. Code, sec. 7036, sub-sec. 36.

²Sec. 6949 of the Code.

³Shann. Code, sec. 6949.

Sections 7094 and 7099 of the Code, relate specially to indictments or presentments for gaming and libel—both misdemeanors. They provide what may be omitted from indictments, and what shall be sufficient to be stated.

Section 6973 of the Code defines an "information." It is not the information of the common law. The information of the statute is the written allegation made to any magistrate, that a person has been guilty of some designated public offense, for the purpose of taking the necessary steps to arrest and bind him over for further proceedings. (Shann. Code, sec. 6973.)

As will be seen from the foregoing sections of the Code, the Attorney General of Tennessee correctly stated the *statute* law of Tennessee when he admitted on the trial of this case in the Supreme Court, that under Tennessee's system of jurisprudence "no other form of prosecution of either felony or misdemeanor is known, save by indictment or presentment."⁴ This, of course, leaves out of view altogether "small offenses," or those petty offenses for which only a small fine is imposed, and which may be dealt with by justices of the peace, or mayors of the towns.

"May" means "shall," when that is the meaning it ought to have in the statute. To say that "*all* violations of the criminal law *may* be prosecuted by indictment or presentment" must mean *shall*, because a large number of violations (that is, all that were felonies at common law) *must*

⁴Attorney General's Brief, Trans, p. 487.

be prosecuted by indictment or presentment by virtue of the requirement of the Constitution. As a general rule "may" means "shall" in statutes.⁵

Undeniably, then, the *law* of Tennessee in force at the time the Anti-Trust Act of 1903 was passed, and which is still in force as to persons, and also as to corporations except in so far as the same may be altered by this Anti-Trust Act, is this:

1. It has always been *the practice* in North Carolina, and in Tennessee from the time it was cut off from that State, to put persons accused of offenses which are misdemeanors, to answer the charge by indictment or presentment, the same as in felony cases.⁶

2. If this Anti-Trust Act of 1903 had have imposed a *fine*; or if it had simply declared a violation of its provisions to be a "misdemeanor," *without* describing the form or mode of punishment, leaving that to the general provisions of the Code, an indictment or presentment would have been necessary and proper, even as against *corporations*.⁷

3. No other form of prosecution, either of felonies or

⁵*Dollman v. Collier*, 92 Tenn., 664; *Barnes v. Thompson*, 2 Swan, 312; *Lewis v. State*, 3 Head, 149; *Farmers', etc., Bank v. Johnson*, 3 Humph., 26.

⁶*McGinnis v. The State*, 9 Humph., 50.

⁷*Op. Neil, J., Trans.*, p. 522.

misdemeanors, than indictment or presentment, has ever been known to Tennessee's system of jurisprudence.⁸

4. Under the *Constitution* of Tennessee, no person can be put to answer a criminal charge, which was of the dignity of a "felony" at *common law*, except by indictment or presentment.

5. Under the *Statutes* of Tennessee, no person can be put to answer a criminal charge which is a misdemeanor (above a "small offense"), except by indictment or presentment.

6. Under the *Constitution* of Tennessee, persons accused of misdemeanors in the absence of a statute, can be put to answer the charge by information instead of indictment or presentment, but when charged by information, the accused is entitled to a trial by a jury.

It is proper in this connection to ask, what is an information? It is a personal accusation preferred by the district attorney, instead of by the grand jury.⁹ The same trial by jury must be had and the same proceedings be followed in the Criminal Court, under an information as under an indictment. The only difference is that the accusation is preferred by the Attorney General instead of by the grand jury.¹

⁸Attorney General's Brief, Trans., p. 487.

⁹*State v. Kyle*, 56 L. R. A., 120; s. c., 166 Mo., 287.

¹⁴Black's Comm., 310; 4 Adjudged Words & Phrases, 3586; 3589.

It is conceded by the Supreme Court of Tennessee that *natural persons* accused of violating this statute, have certain rights under the Constitution and laws of this State. These rights, which we have denominated "defensive rights," among others are as follows:

(1) The accused must be put to answer the charge by indictment or presentment;²

(2) He must be tried by a jury of twelve men;

(3) The guilt of the accused must be established beyond a reasonable doubt.

(4) The statute of limitations may be interposed when the time has fully run, as a complete defense.

(5) All the defensive rights allowed in criminal prosecutions shall be enjoyed by persons put to answer the charge of violating this statute.

The Supreme Court of Tennessee holds, and decides in the present case, that under this Anti-Trust Act, *corporations*, whether foreign or domestic, proceeded against for violating its provisions, enjoy *none* of the defensive rights above enumerated, secured to persons—*not one*.³

These rights are substantial ones. The right to have the accusation first considered by a grand jury, and by an un-

²Brief of Attorney General, Record, p. 487; *Sevier v. Washington County*, Peck. (Tenn.), 339, 362.

³Opinion, Record, p. 520.

trammelled grand jury, is a substantial one. This Court has said that

“It is the right of the accused to have the question of his guilt decided by *two* competent juries, before he is condemned to punishment.

“It is his right, in the first place, to have the *accusation* passed upon, before he can be called upon to answer the charge of crime, by a *grand* jury of good and lawful men.” (*Crowley v. United States*, 194 U. S., 473.)

The right to a trial by a jury, to have the question of guilt passed upon by twelve laymen and a judge, instead of by a single judge, is a substantial and cherished one.

The right to have one's guilt established beyond a reasonable doubt, instead of by a mere preponderance of the evidence, is obviously a most valuable one.⁴

In Tennessee, the statute of limitations is a complete defense. When it has run, the accused cannot be criminally punished.⁵

The reasoning, in the opinion of the learned State Judge, whereby the conclusion is reached that the Anti-Trust Statute of Tennessee, which accords these defensive rights to *persons*, and at the same time *denies* them to *corporations*, is valid is *in substance*, this:

⁴23 Am. & Eng. Ency. Law, p. 948 (2d ed.)

⁵*Turley v. The State*, 3 Heisk. (Tenn.), 11. (To the same effect are 33 Texas, 22; 17 Florida, 195.)

Judgments against corporations, of dissolution and of ouster, are mere *civil* judgments. *Quo warranto* was the procedure by which corporations were dissolved at common law, and *it* was not a criminal proceeding. A bill in equity upon relation, is the procedure in Tennessee which has been substituted for *quo warranto*, and *it* is not a criminal proceeding; and it is the proceeding prescribed by this Anti-Trust Act. Moreover, the bill in equity upon relation, is the proceeding which this Court has said is the proper proceeding to oust a foreign corporation. Inasmuch as this bill in equity upon relation, is merely a *civil* proceeding, neither the constitutional requirement that no person shall be put to answer any criminal charge, but by indictment or presentment, nor be put to trial otherwise than by a jury, nor the rule that guilt must be established beyond a reasonable doubt, nor the rule that the statute of limitations (effective as a defense in criminal cases) have any application to proceedings against *corporations* under this Act. The reason is, that these defensive rights exist only in *criminal* proceedings. They do not exist in *civil* proceedings, and this proceeding is purely a civil one.

Moreover, it is reasonable to provide a civil remedy against corporations, and a criminal one against persons for violating the same general law, for the reason that corporations cannot be imprisoned, while persons can. And, ouster can be inflicted on corporations, and cannot be inflicted on persons.

Undeniably, if this statute had have imposed a *fine*, instead of dissolution, or ouster, on offending corporations, or had stopped short of prescribing the punish-

ment by merely denouncing violations of its provisions as unlawful, leaving the *punishment* to be inflicted under the general provisions of the Code, the indictment and trial by jury according to the usual course in criminal proceedings *would* have been necessary. But inasmuch as the punishment which is to be inflicted is specifically defined by the statute, and is a punishment that is peculiar to corporations, the statute is valid. (Trans., pp. 520, 522.)

It will be observed that the Court, in no part of its opinion contends that the *offense* is, or that it can be, different when committed by persons, from what it would be when committed by corporations. The unlawful *offense* is necessarily the same, whether committed by one or by the other. Such offense not only violates the statute in the same way, but it affects commerce in the same way, whether committed by natural or artificial persons. The offense, and the effects of that offense, are precisely the same in both cases.

The object of a trial is primarily to ascertain whether the accused is guilty, and then to punish, if guilt be established. In order to meet the ends of justice, certain rules have been established, some of them by the Constitution itself, for the conduct of these trials. In all fairness and justice, inasmuch as the *offense*, whether committed by natural or artificial persons, is *precisely the same*, there can be no reason why the *quantum* of evidence required to establish guilt, should not in both cases be the same. If the matter ought to be investigated by a grand jury, and the

case tried by a jury in one case, surely ought it also in the other. And if the statute of limitations be available to natural persons as a defense, so also ought it to be available to corporations.

The view of the Supreme Court of Tennessee, presented in the opinion as an answer to the foregoing, is, that unless the statute imposes a money fine, the same punishment cannot be meted out to natural and to artificial persons, because of their different natures. Undoubtedly, there are some punishments which can be imposed upon natural persons that cannot be inflicted upon corporations. A corporation cannot be imprisoned. But the fact that the same *kind* of punishment cannot always be inflicted, is no reason why that for the *same* offense the same kind of a *trial* to determine the question of guilt or innocence shall not be had, and the same rules of evidence be employed, and the same rights of defense be allowed to both, equally and alike.

The Supreme Court of Tennessee thought, inasmuch as the procedure employed for many years to dissolve corporations, is a *civil* proceeding, and therefore one which *excludes* indictment, trial by jury, proof beyond a reasonable doubt, the defense of limitations, etc., that therefore it is entirely allowable to adopt it here to dissolve corporations, or to oust them, even though the object is *punishment*.

But this overlooks the fact that the primary question in a proceeding under this statute is the establishment of

guilt, and that punishment is a consequence, or secondary step in the proceeding. It by no means follows that because such a procedure (that is, a mere *civil* procedure) has been employed in times past to prevent usurpation and to dissolve corporations (*not to punish them*) it may now be used to establish guilt for the violation of a general criminal law, when that same procedure is not employed to establish the guilt of persons accused of similar violations of the same law; and particularly is this true when there is a new law, the Fourteenth Amendment to the Constitution of the United States, paramount to all statutes, which secures to corporations as well as persons, the equal protection of the laws.

The question is not, how we were accustomed to proceed in times past, against corporations for *corporate* misconduct; but it is, how shall corporations be proceeded against *now*, since the Fourteenth Amendment, to *punish* them for offenses against *general* criminal laws, committable by natural and artificial persons equally and precisely alike? It is not a question of the procedure to be employed against corporations for wrong-doing *as corporations*, but it is one as to the procedure to be employed against them as *criminals*—for committing crimes committable by them and natural persons equally and alike, at the same time and in the same way.

Assume, for argument, that the procedure may be different in some respects, because of certain differences between natural and artificial persons, nevertheless, the dif-

ferent procedures must equally and alike regard, and safeguard, the *defensive rights* of the accused. The reason is that *they cannot* be, and in no wise are, affected by the differences which we do find existing between natural and artificial persons.

Assume, further, that a bill in equity upon relation, is a proper procedure for the dissolution or exclusion of corporations for violations of the general criminal laws, nevertheless, must there not be the same defensive rights—that is, the same rights as to trial, proof, and defense? And if these be withheld, has there not been a denial of the equal protection of the laws? The answer that the Supreme Court of Tennessee has made in its opinion, to meet these suggestions, we respectfully submit, when analyzed, is no answer at all. That Court says:

“If the statute had declared a *fine* against it (the corporation), an indictment *would* have been proper; or if the Act had simply declared unlawful the things it denounced, there might still have been an indictment, as for a misdemeanor; but having declared, in terms, the legal consequence of a breach of the legal inhibition, there could be no indictment. But the Defendant says: *‘The legal consequences of the breach I am to have imposed upon me, and am to suffer through the machinery of a court of equity, where I cannot have the benefit of the reasonable doubt, or the benefit of the statute of limitations which the sovereign concedes in criminal cases, but does not in its own courts in civil suits, and I am also deprived of the right of a*

general verdict of guilty or not guilty, according to the course of practice in criminal courts.'

"But suppose I turn the case about, and consider what a natural person might say. He complains: '*I am subjected to the humiliation of an indictment for a felony, and if convicted I may be sent to the penitentiary for a term of years, while a corporation that does the same thing is subjected merely to the loss of a civil power, the right to do business; while I am subjected to the humiliation of the criminal court, a corporation for the same act enjoys the benign principles that are administered in a court of equity.*' Is not the case of a natural person as strong, in the matter of discrimination, as that of a corporation? What then? Is it true that for the same breach of duty a corporation and a citizen must both be indicted? Although owing to the different natures of the natural person and the legal person, the same punishment cannot be inflicted? Although it is impossible to reach the same end as to both by the same means? Although as to the natural person it may result in imprisonment in the penitentiary for ten years, and as to the corporation only in a fine, or money judgment? Would there be no inequality in that result? But it will be said that the Legislature *might* have authorized an indictment and annexed as punishment forfeiture of corporate franchises in case of domestic corporations, and ouster for foreign corporations? If so, there would have been converted into a criminal sentence a judgment which has been from time immemorial held to be but a civil determination. Shall all these *hoary precedents* be overturned to attain a state of harmony with an abstract theory? The true theory is that

corporations and natural persons are *so diverse* in *some* respects, that there is *no* basis or common ground of comparison, *but a necessity of simple antithesis*. And such is the particular aspect in which they are presented in the present litigation." (Opinion, Record, p. 522.)

This reasoning, as will be perceived, in substance is, that although corporations *are* discriminated against by the statute in the respects now complained of, yet it is also true that persons are discriminated against in some other respects also—that is, that the mistreatment of both by the same statute seemingly operates as a kind of set-off to so neutralize their mutual injustices as to *result* in the equal protection of the laws. It also means that corporations and persons are so "diverse in some respects" that there is no basis of comparison between them, and "a necessity of simple antithesis." This, we understand to mean that because natural and artificial persons differ in some respects, they must in *all* cases be considered in *contrast*, the same as if they differed in all respects. This, we submit, is another "illation" which is not "logical."

For, as will be observed, the discriminations and inequalities of which the Standard Oil Company complains, do not relate to the *nature* of the *punishment*, but to the *rights of trial and defense*. It complains that this statute denies to all corporations, and therefore to it, the equal protection of the laws, and deprives it of its property without

due process of law in the specific particulars hereinbefore mentioned.⁶

When the learned Judge "turns the case about," as will be perceived, he *does not deny* that the discriminations complained of are made by the statute. Upon the contrary, he concedes them to exist.⁷ But the answer made, to justify and sustain the statute, is that the State has the right to do this because these discriminations *result* from the use of a bill in equity, in place of an indictment at law, which the Legislature was *warranted* in employing. Notwithstanding these results, inasmuch as a bill in equity is a *civil* proceeding, the "hoary and venerable" proceeding that has been used a long time to dissolve corporations *for wrong-doing as corporations*, the statute is now held to be valid.

The distinction between (1) the nature of the *punishment*, and (2) the *defensive rights* of the accused, or, the rights of trial and defense which accused *persons* enjoy, appears altogether to have escaped the sagacity of the learned Judge. It is true that a corporation guilty of violating this or any other statute, cannot be imprisoned. True it also is that a natural person can. That may be and indeed is, a good reason for imposing *different kinds* of punishment, but obviously it is *no reason* at all why the *guilt*, on account of which the punishment, whatever may

⁶See page —, within.

⁷Opinion, Record, pp. 520, 522.

be its form, *is* inflicted, shall be required to be established by the proof, beyond a reasonable doubt as to natural persons, and by a bare preponderance of evidence as to artificial persons.

The same thing is to be observed with respect to the trial of persons by a jury and a judge at law, and the trial of corporations by a judge alone in equity, to establish guilt. Because the *punishments* imposed by the statute may be different; because a corporation cannot possibly be imprisoned, while natural persons can, is no reason why the tribunal which is to determine the question of guilt, and the number of persons who are to decide it, shall be different. A distinction is made where no reason or grounds whatsoever for discrimination exist.

In one part of the opinion of the learned Judge below, it is stated that a jury may be called for on a trial in the Courts of Chancery in Tennessee. Indeed, the learned Judge at first declared that

“The right of trial by jury, the deprivation of which is complained of in the assignment of errors, is preserved under section 5172.”⁸

But, it was immediately added:

“It is true that a jury is *not* permitted in cases of this kind to render a *general verdict*, as in ordinary cases at common law.”⁹

⁸Section 3416 of the Code; Record, Opinion, p. 520.

⁹Opinion, Record, p. 520.

As will be observed, this was in reality a recantation of the first statement, and for the reason that the learned Judge must have recalled that in Tennessee it has long been the settled law that a jury does not *try* a case in equity, at all. It renders neither a general *verdict*, nor a special *verdict*. In Tennessee a jury may be called for, to determine *issues* of fact, in any chancery case. The party calling for the jury may submit such of the "issues" raised by the pleading, as he sees fit, but is not obliged to submit all the issues raised by the pleadings because he has called for a jury. The jury does not return a general verdict, nor a special verdict. It responds to these issues or questions, and answers *them*. Thereupon the Chancellor, assuming the facts to be as the jury has found the issues, considers them, and such other relevant matters as may not have been submitted, if any there be, and decides and determines the case himself.¹

It is obvious that the right of trial by jury is not preserved by the section of the Code to which the Attorney General refers.

Now with respect to the defense of the statute of limitations: This discriminating denial is said in the opinion

¹*Ragsdale v. Gossett*, 2 Lea, 739 *Perry v. Clift*, 54 S. W. Rep., 128; 16 Cyc., 418; *Conner v. Frier-son*, 98 Tenn., 183.

of the learned State Judge to be justified upon the ground that the statute prescribes the bill in equity upon relation as the procedure—a *civil* proceeding, and one in which the statute of limitation cannot be pleaded against the statute; and it is claimed also upon the ground that the offense committed by *persons* is a *felony* as to which the statute of *one* year, sought to be relied upon in the present case, is not pleadable as a defense. This argument appears to lose sight entirely of the ground of the Defendant's complaint. The Standard Oil Company does not contend that *this* proceeding is a criminal proceeding, nor that *quo warranto* was always a criminal proceeding. Upon the contrary, it complains because the procedure is civil, and for that reason held to cut off the defense of the plea of statute of limitations, which would be a good defense in the present case, if the Company were proceeded against as natural persons must be—by indictment or presentment.

The complaint is that the procedure unjustly discriminates against the Defendant because it is precisely of *the* character, and precludes the Defendant precisely in *the* manner, that the State Court says it does. The fact that it was the practice at common law to proceed against corporations for a *corporate* wrong, for some sin against the law of *corporate* being, through a *civil* proceeding, is no reason why persons and corporations should now be proceeded against for committing the same *crime*, or for an offense against some general *criminal* law, by *different* procedures. When it is recalled that the Fourteenth Amend-

ment secures to corporations the equal protection of the laws, whatever may have formerly been the procedure against corporations for *corporate* offenses, no such procedure for *crimes*, can now be put in force against them, *unless* their *defensive rights* under such procedure, are preserved and are the same as those which natural persons possess when accused of, and put to trial for, the same crimes.

Nor is it true that the offense when committed against this statute *by corporations*, is a felony. When the opinion of the State Court is carefully considered, it will be perceived that it really does not so decide. Our contention below was, and it still is, that the offense of violating this Anti-Trust Act is a misdemeanor. That Court held that this offense is a "felony" so far as *persons* are concerned; and it based this holding upon the ground that under the *Code of Tennessee*, any offense that may be punished by imprisonment in the *penitentiary* is a felony. On that point the Court, quoting from a previous opinion, said:

"The fact that the punishment for the attempt is in the *alternative*, either by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, does not make it any less an offense punishable by imprisonment or take from it the characteristic of a felony. Therefore the limitation for misdemeanors would not apply, and the case does not fall within any of the accepted classes of felonies." (Opinion, Record, p. 524.

As will be observed, *this was said with respect to persons alone*. And it is obvious that it must be restricted to them. It *cannot* be applied to corporations, because corporations *cannot be imprisoned* in the penitentiary. For if it be applied to corporations, it *overthrows* the argument upon which the conviction in the present case is attempted to be sustained. The basis of the Court's holding is, that the judgment here pronounced is not a *criminal* sentence, but a *civil* judgment; that this is *not* a criminal proceeding, but a civil one, and that therefore the rules of law applicable to criminal procedure do not apply, and the *defensive rights* which are enjoyed in such cases, do not exist. Manifestly, it would be illogical, and destructive of that view, for the Court by such reasoning as *that* above referred to, to make the offense of violating this statute when committed by a *corporation* a *felony*, in order to escape the plea of the statute of limitations of one year. The Court said the offense was a felony when committed by a *person*, *because*, under the general provisions of the Code that person could be put in the penitentiary. If that reasoning is to apply to corporations it must be applied, because the punishment is to be regarded as the *equivalent* of imprisonment in the penitentiary; and if imprisonment in the *penitentiary* is the punishment, the case is then certainly one for criminal procedure wherein the defensive rights which have been denied in the present case can be enjoyed.

The argument of the State Court is, that under the Act of 1873 (Shannon's Code, sec. 7185) persons violating the

Anti-Trust Act of 1903, are guilty of a "felony," because that section provides that they may be imprisoned in the penitentiary.² Being a felony, the statute of one year, which is applicable to misdemeanors, could not be pleaded, even by persons, in a criminal case. That is the argument of the Supreme Court on this point. If that argument be sound, corporations cannot be guilty of a felony in violating this Anti-Trust Act, because what is said in section 7185 of the Code *cannot* apply to them. It cannot apply, because *they* cannot be imprisoned in the penitentiary.

If section 7185 of the Code makes a natural person's offense a felony because he can be put in the penitentiary under the Anti-Trust Act, it cannot make a corporation's offense under that Act a felony, for the obvious reason that a corporation cannot be put in the penitentiary. The fact that persons *may* be put in the penitentiary, cannot be used as a basis for an argument against corporations which *cannot* be put in the penitentiary. *Consequently, in this respect we must look to the Anti-Trust Act alone.*

That Act cannot be helped out, in *this* respect, by section 7185 of the Code. That section relates to offenses under statutes which makes given acts criminal or unlawful, *without* classifying or grading the crimes. If, for example, a statute should provide that the offense which it creates and declares to be unlawful should be a "misdemeanor," or that it should be a "felony," it is accordingly a misde-

²Opinion, Record, p. 524.

meanor or a felony by virtue of the specific, express, terms of that statute; but if another statute says that a given act or offense shall be "unlawful," *without* specifying whether it shall be a "felony" or a "misdemeanor," section 7185 of the Code comes into play and makes that unlawful act or offense a felony or misdemeanor according to the punishment that has been prescribed by the statute which made the act unlawful. If that statute prescribes imprisonment in the penitentiary, the offense is a felony; if it prescribes a fine or imprisonment in jail, it is a misdemeanor.

The Anti-Trust Act of 1903 prescribes neither fine nor imprisonment of any kind as the *punishment* of offending *corporations*, either domestic or foreign; consequently the offense of violating its provisions when committed by corporations, is not within section 7185 of the Code, and that section can have no relation whatever to such offense.

This anti-trust statute expressly says that:

"Any violation of the provisions of this Act shall be deemed, and is hereby declared to be, destructive of full and free competition and a *conspiracy against trade*," etc.

As will be observed, it not only forbids certain acts, but it expressly says what offense these forbidden acts shall be. It says that any such forbidden act shall be deemed, and shall be, a *conspiracy against trade*. Authorities need not be cited to show that a conspiracy against trade was not a felony, but only a misdemeanor, at common law.

By the Code of Tennessee, a conspiracy against trade is made a misdemeanor.³ Reading this general Code, and the later special act together, as all acts *in pari materia* must be read, and as acts subsequent to the Code relating to the same subjects must be read in Tennessee⁴ we find this to be true; under the Code, all “conspiracies against trade” are misdemeanors; and under the Anti-Trust Act, all violations of its provisions are “conspiracies against trade.” That is to say, under both the Code and the Act the offense committed by the Defendant, in violating the Anti-Trust Act, is a *misdemeanor*, by virtue of the provisions of the *Code*. The statute of limitations as to all misdemeanors (except gaming) is twelve months.⁵

The Supreme Court of Tennessee holds that this statute does not apply in the present case, for the reason (says the Court) that there is *no* statute of limitations applicable to the State in *civil* actions, and that this is a civil action.⁶ As before stated, the opinion discusses section 7185, but solely in its relation to *persons*. Really it does not assume to apply that section to corporations. It could not do so, for *that* would be to make the case a criminal one; to deal with it as one in which the punishment inflicted was con-

³Shann. Tenn. Code, secs. 6736, 6993, 6694.

⁴11 Ency. Dig. Tenn. Rep., 532; *Cowan v. Murch*, 13 Pickle, 590; *Carroll v. Alsup*, 23 Pickle, 273; 58 So. West. Rep., 756.

⁵Shann. Code (Tenn.), secs. 6942-5; Opin., Rec., 523.

⁶Opinion, Record, p. 523.

strued to be the *equivalent* (in law) of imprisonment in the *penitentiary*.

The statute of limitations of one year is a complete defense in Tennessee, when it is pleadable.⁷ The conspiracy agreement was made and ended on the 12th day of October, 1903. This bill was brought on the 16th day of March, 1907, more than three and a half years after the offense was committed.

It is respectfully submitted that the opinion of the learned Judge is contradictory in its dealing with the obstacles that were urged to a conviction in the present case. In one part of the opinion it is said that the provisions of the Tennessee Code as to Bills upon relation, are "entirely new," though intended to serve the same purpose as *quo warranto* proceedings, and that while in practice it is "assimilated as far as may be convenient to the old practice," this "does *not* apply to absolute rights inhering in the new process inaugurated by the Code.*

And yet, in another part of the opinion it is said:

"But will it be said that the Legislature might have authorized an indictment and annexed as *punishment* the forfeiture of corporate franchises in case of domes-

⁷*Turley v. The State*, 3 Heisk., 11; Shann. Code, secs. 6942-5.

*Opinion, Record, pp. 520, 521.

tic corporations, and ouster for foreign corporations? If so, there would have been converted into a criminal sentence, a judgment which has been from time immemorial, held to be but a civil determination. Shall all these *hoary precedents* be overthrown to attain a state of harmony with an abstract theory?"⁸

Comparing these two abstracts from the opinion, it will be perceived that when the Court is engaged in removing one obstacle in the way of conviction, the procedure employed in the present case is said to be "entirely new," and though assimilated as far as may be correct to the old practice, it does not apply to those absolute rights "inhering in the new process inaugurated by the Code." That is to say, the procedure in this respect is *new*. Nevertheless, when in another connection the opinion is beating down another obstacle to conviction, the Court almost pathetically raises its voice against the overturning of "hoary precedents," and that, too, even though it is done to obtain the equal protection of the laws, or as the Court prefers to phrase it, "attaining a state of harmony with an abstract theory."⁹ It is not clear from the opinion whether the Court means to say that the legislature *could not* have authorized an indictment and annexed as a punishment a forfeiture of corporate franchises in the cases of domestic corporations, and an ouster in the case of foreign corporations, for the reason that *that* would have been to convert a

⁸Record, Opinion, p. 523.

⁹Record, Opinion, p. 523.

civil judgment into a criminal sentence; or whether the Court means to say merely that it would be *unwise* and *impolitic* to *indict*, and to inflict the punishment above mentioned on corporations, instead of proceeding by bill in equity upon relation—unwise and irreverent for the reason that “*hoary precedents*” would be overthrown to attain a state of harmony with an abstract theory, and a shocking thing thereby be done. If it was meant to say that the legislature *could not* have done it, then it is said in apparent forgetfulness of the fact that the Court elsewhere had *admitted* that if the Act had seen fit to impose a *fine*, or had been *silent* as to the punishment, it would have been regular, and the proper proceedings would have been by indictment, or presentment, according to the course of the criminal law;¹ and it also said in forgetfulness of the fact that the Legislature of Tennessee has discarded the “*hoary precedents*” referred to. Chapter 89 of the Acts of Tennessee of 1907, is an Act which makes it a felony for any person or corporation to keep a place for betting on horse-racing. It provides that any *person* who violates its provisions should be fined and imprisoned in the penitentiary, and that any *corporation* violating its provisions should be fined “and in addition to such fine, its charter shall, *by such court* be adjudged to be forfeited, and its corporate existence and right to do business in this State cease and determine.” Forfeiture is expressly made a *part* of the punishment, and the judgment of forfeiture is a part

¹Record, Opinion, p. 522.

of the judgment of conviction, by the Court which tries the case.² It may be that a bill in equity ought probably to follow such judgment if the corporation be a *domestic* one in order to wind up its affairs, but a court of equity has ample jurisdiction to entertain such a bill, without an enabling clause. No such provision in the statute was necessary. And in the case of *foreign corporations*, there are no affairs to be wound up. The corporation is forbidden to do business, and merely *ceases* to do business in Tennessee.

CLASS LEGISLATION.

Undeniably, it is competent for the Legislature to legislate with reference to *classes*—to prescribe different rights and duties, and different punishments, for different classes. For example: If a given offense be of such gravity that the legislature conceives that persons who are guilty of committing it should be imprisoned for as much as ten years, and corporations guilty of the same offense should be dissolved or ousted, the fact that it is impossible to imprison a corporation is a good reason for the difference in the *punishment*. But class legislation, in order to be valid and constitutional, must always have a *reasonable relation to the nature of the subject*. It cannot be capricious or arbitrary. The rule has been both enounced and established by decisions of this Court, and also of the Supreme Court of Tennessee.

²For this Act see Appendix, p. 145.

SANTA CLARA *v.* SOUTHERN PACIFIC R. R., 118 U. S., 394.

The case in which it was *first* held that corporations are *persons* within the meaning of the Fourteenth Amendment was this case which was decided in 1885; and it was so held *without argument*. Before argument began, Mr. Chief Justice Waite said:

“The Court does not wish to hear argument on the question whether the provisions in the Fourteenth Amendment to the Constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.”

GULF, COLORADO & SANTA FE RAILWAY CO. *v.* ELLIS,
165 U. S., 151, 154.

“It is well settled that corporations are persons within the provisions of the Fourteenth Amendment to the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

“But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States

the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While as a general proposition this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. . . .

“That (the basis) for the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis.”

Among other authorities cited to support this proposition is *Dibrell v. Morris' Heirs*, 85 Tenn., 499, 535.

PEMBINA MINING CO v. PENNSYLVANIA, 125 U. S., 188.

“The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of ‘person’ there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name and have a succession of members without dissolution. As said by Chief Justice Marshall, ‘The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.’”

MAXWELL *v.* DOW, 176 U. S., 596.

“The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from, nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen.” (176 U. S., 596.) . . .

“It appears to us that the questions whether a trial in criminal cases, not capital, shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime, a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State, themselves, and do not come within the the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the *same kind of procedure*, and to have the *same kind of trial*, and the *equal protection* of the law is secured to them.” (176 U. S., 604.)

NEAL *v.* DELAWARE, 103 U. S., 370.

Dissenting from the proposition that practical exclusion of colored persons from the jury was a denial of that equality of protection secured by the amendment, Mr. Justice Field said that the

. . . "equal protection of the laws of a State is extended to persons within its jurisdiction within the meaning of the amendment when its courts are open to them, on the same condition as to others with *like rules of evidence*, and *mode of procedure*, for the security of their persons and property, the prevention, and redress of wrongs, and the enforcement of contracts; when they are subject to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuit of happiness which do not equally affect others; when they are liable to no other nor greater burdens and charges than such as are laid upon others; and when no different nor greater punishment is enforced against them for a violation of the laws."

The proposition that equal protection of the laws requires that the courts shall be open to parties accused on the same condition as to others with like rules of evidence and modes of procedure for the security of their persons and property has not been denied in any case, and this case was quoted with approval by the Supreme Court of Maine in *State v. Montgomery*, 94 Maine, 192; 80 Amer. St. Rep., 392.

This is also the rule in Tennessee. The classification must not be arbitrary, but reasonable and natural.¹

Even when the *classification* is not arbitrary or unreasonable, but the *discrimination* is based upon matters that have

¹*Stratton Claimants v. Morris*, 89 Tenn., 479, 453; *Sutton v. State*, 96 Tenn., 709; *Burkholtz v. State*, 16 Lea, 72.

no relation to the object, and support no such discrimination the legislation is invalid.²

An arbitrary or unreasonable discrimination or classification by a State statute, is a denial of the equal protection of the laws.³

All this means that different laws may, indeed should be, made not only for different things, but also for different *classes* of things, when the classes are characterized by qualities to which the differing laws will have just relation. Men, women and children are all persons, but these classes of persons differ so greatly in some respects as to require different laws and regulations. But in so far as persons are *alike*, whether they be men, women or children, the laws which control them must be equal and uniform.

And so it is with corporations. Corporations are *persons* within the contemplation of the law, for many purposes and in many respects. In so far as natural persons and artificial persons (corporations) are the same the laws should be the same—indeed must be the same in order that equal protection shall be afforded.

However sharply defined a *class* may be, laws must nevertheless be uniform and general, unless the class has

²*Atch., etc., R. R. v. Matthew*, 174 U. S., 105.

³*Colting v. Kansas City, etc., Co.*, 183 U. S., 79, 105;
Atchison, etc., R. R. Co. v. Matthews, 174 U. S.,
105.

some distinctive characteristic to which laws of a class-nature will have a reasonable relation. It is not sufficient in order for a class-law to be valid, that it can be shown to relate to a *class*. It must have also a reasonable relation to some distinctive characteristic of that class fairly calling for special legislation.⁴

Tested by these principles, it is obviously not sufficient for the Attorney General to show that natural persons and artificial persons are unlike in some respects, in order to sustain the statute on which the present proceeding is based.

That natural persons may be imprisoned, while artificial persons cannot, is a sufficient reason for prescribing different kinds of punishment—punishment adapted to the offenders; but it is no reason at all for prescribing different kinds of trial to determine the question of guilt, and different *quantita* of evidence to establish guilt.

Inasmuch as corporations commit crimes *only* through natural persons, through agents whose guilt is *imputed* to the corporations, no reason can be imagined why, for the offense of violating a general criminal law, natural persons should be put to answer the charge, or be tried, in a way to enjoy the defensive rights hereinbefore described, while artificial persons are tried in a way in which all these defensive rights are denied.

⁴174 U. S., 105; 165 U. S., 154; 85 Tenn., 499, 535.

Not only is there no reason for such a discrimination, but there is a Constitutional inhibition against it. It is forbidden because it is a denial of the *equal protection* of the laws.

The Attorney General admits that proceedings *quo warranto* have never been in force in Tennessee.* The Bill in Equity upon relation, which has been substituted for *quo warranto* in Tennessee, is employed against corporations *as such*—for some sin against the laws of *corporate* being. It has not been employed to *punish* them for *crimes* which are violations of *general* criminal laws. Assuming that this proceeding may be employed if the legislature be so minded, it must be employed subject to the Fourteenth Amendment. If the same defensive rights accorded to criminal *persons* when accused of violating a general criminal law, are accorded to criminal *corporations* when so accused, the demands of the Fourteenth Amendment are satisfied, since the law regards substance rather than form. If the two accused offenders are given the same hearing, and the same rights of jury trial, and guilt is required to be established by the same *quantum* of evidence, and they can equally interpose any defense that exists, it matters not whether the accusation be in the *form* of an indictment or of a bill in equity. *Equal protection* is the essential thing.

The Attorney General's view appears to be that a law is "equal protection" which applies to all persons of a *class*

*Brief, p. 46.

alike, for he argues that this Tennessee statute is unobjectionable inasmuch as it provides that *all corporations* accused of violating the provisions of the Act must be proceeded against by bill in equity upon his relation. But, as previously explained, this is not an adequate view. If the *offense* were one *peculiar to corporations*, the Attorney General would be right. In such case a statute for the punishment of that offense, applicable to *all corporations*, would not be "unequal" or partial. The offense of which the Standard Oil Company is accused is not peculiar to corporations. It is one committable by natural and artificial persons equally and alike. It is a violation of a general criminal law.

Even though a statute relates to *all* the individuals of a *class*, it is partial and unequal if it be not related to some feature or characteristic that is peculiar to the class.⁵

For example: An act making it unlawful for any miller to adulterate flour by adding cornmeal would be valid; but an act making it unlawful for any miller whose mill is operated by *steam power*, or by a corporation, to so adulterate his product, would be void. Why? The statute applies to the *class* as a whole—to *all* steam mills. But it does not apply to water mills, and mills run by electricity, or (in the second case) to natural persons. And while this act applies to the entire *class* of steam mills, the feature to which it applies is not peculiar to the class, and therefore

⁵*Atchison, etc., R. R. v. Matthew*, 174 U. S., 105.

the act is void. No reason exists why flour made by steam mills, or by corporations, should not be adulterated, while flour made by other mills or by natural persons can be adulterated.

And so it is here. This statute forbids conspiracies against trade, whether the offender be a natural or an artificial person—which is good. No reason for a distinction exists. It provides different kinds of punishment—which is also good, because they *cannot* be punished severally in the same way.

But it provides different forms of procedure to establish the guilt of the accused, in order to punish—for which no good reason can be given. It may be conceded that if the *effects* and results were the same, there would be no real objection to the different forms of procedure, since substance and not mere form is to be regarded.

One form of procedure accords certain important and *defensive rights*, which the other form wholly denies. The effect is to make what on the surface appears to be a mere matter of form, a matter of vital substance.

Let us now apply these principles to the present case. Is there any reason why, for the same criminal offense, *persons* should have the right to have the question of whether

an accusation *should* be brought, to be first determined by a grand jury, while *corporations* are *denied* this right? Is there any good reason why, for the same offense, natural persons shall have the right of trial by jury, that is, the judgment of twelve laymen and a judge, as to their guilt or innocence, while corporations are required to submit to the judgment of the judge alone? Particularly should no such discrimination be made when it is remembered that the guilt of a corporation, is always *imputed* guilt. The *stock* of a corporation is usually owned by numerous shareholders who have but little knowledge of the management. What has been done is reported at annual meetings *after* it has been done; but as a matter of fact they know, and can know, but little of that which is done, *at the time*. When a corporation is dissolved, or ousted, because of a violation of law, the stockholders are those who suffer, and they suffer for offenses in which they do not participate, and of which, in the nature of things, they could have little or no knowledge until the coming-in of the annual *report*. Nevertheless, their innocence is not, and on grounds of public policy it should not be, a defense. On grounds of public policy they should be held to lose their property, if the agents of their own selection violate the laws; for otherwise, those who profit by the agents' wrong-doing, would escape. *But*, when the guilt of the corporation is *imputed* guilt, and the corporation is to be made liable, because the guilt of its agents, on the ground of public policy, must be imputed to them, the reasons are stronger why all *defensive*

rights should be enjoyed, than it is even in the case of natural persons themselves.

Is there any reason why the *guilt* of a corporation should be established by a mere preponderance of the evidence, when the guilt of the agent is required to be established beyond a reasonable doubt?

Is there any reason why that agent should have the right to interpose the statute of limitation, whatever that statute may be, when it has run, when the corporation to which *his* guilt is *imputed*, is not permitted to interpose the defense of the statute of limitations at all?

While there are differences between natural and artificial persons, those differences are *not of a character* that call for discrimination, *in the matter of the rights of trial and defense*.

As said by Mr. Justice Field, in *Neal v. Delaware*, 103 U. S., 370, the equal protection of the laws of a State is extended to persons within its jurisdiction, when its courts are open to them, on the *same condition* as to others, with *like rules* of evidence, and modes of procedure, for the security of their business and property, for the prevention and redress of wrongs, and the enforcement of contracts; and as said by this Court, in *Maxwell v. Dow*, 176 U. S., 506, the nature or character of the *right* of trial by jury, is the same in a criminal prosecution as it is in a civil action.

If the view which is now presented is sound, all corporations, and therefore this defendant corporation, is denied the equal protection of the laws by the Anti-Trust Act of Tennessee, as interpreted by the Supreme Court of that State. If the legislature was minded to adopt a *civil* procedure to *punish* corporations for a violation of the act, it cannot do so, certainly not without according and securing to them all those defensive rights which are accorded to natural persons. However, if the view presented in the first place is correct, namely: that call this proceeding what you will, looking through forms and to substance, the case is one of a proceeding against a corporation for the violation of a general criminal law, and to inflict *punishment* upon it for that violation; if that be the correct view, it is not possible, under the general and long-established laws of Tennessee, to proceed otherwise than by indictment or presentment. And the Attorney General admitted and conceded on the trial of this case in the Supreme Court of the State that there was no other way to call upon any one in Tennessee to answer *any* criminal charge, than by indictment or presentment.⁶ No such civil proceeding is valid, nor can it be authorized, *unless* it accords and secures to the accused corporation all those *defensive rights* which are secured and enjoyed when the accused is put to answer a similar criminal charge by indictment or presentment.

National Cotton Oil Co. v. Texas, 197 U. S., 115, is

⁶Attorney General's Brief, Trans., p. 487.

cited by the Attorney General* to support the proposition that a bill in equity to oust a foreign corporation for violating an anti-trust statute, is not a criminal prosecution, but is a civil suit. The proposition needs no support. We have not contended that the present proceeding is a criminal prosecution, or that it is not a civil suit. Upon the contrary, we complain because it *is* a civil suit. Our insistence is that it *ought not* to be a civil, but should be a criminal procedure; or if a civil procedure be allowable, it must be one which affords an opportunity to assert those defensive rights which could be asserted if it were a criminal prosecution.

The Texas statutes, referred to in the case last mentioned, 197 U. S., 115, are all set out in 177 U. S., at page 28. These statutes and the Penal Code of Texas, are to be read together as one law. So read it will be seen that the laws of Texas provide that foreign corporations guilty of violating the anti-trust law:

1. Shall forfeit a penalty of fifty dollars a day, to be sued for by the Attorney General; and
2. Shall be proceeded against by *quo warranto* and ousted; and
3. Shall be proceeded against by indictment and punished. (197 U. S., 133.)

National Cotton Oil Co. v. Texas, 197 U. S., 115, was

*Brief, p. 537.

a *quo warranto* proceeding to oust a foreign corporation. This Court said that the case was not a criminal prosecution—which of course it was not.

The point was not made nor considered, that inasmuch as it was brought to *punish* the defendant for the violation of a *general criminal law*, it *ought* to be a criminal prosecution, or ought to admit of the same defensive rights that a criminal prosecution would.

This view of the question was not presented. Moreover, the suit was by petition, and was one in which the accused would have been entitled under the laws of Texas, to a trial by jury.⁷ It is true that it was held by the Texas Court in that case, that the case was a civil one, and therefore the guilt of the accused need *not* be proven beyond a reasonable doubt, but *that* point was not considered by this Court when the case came here. Nor was that point considered by the Texas Court from the standpoint of the Fourteenth Amendment.

RESUME.

1. The Anti-Trust Act of Tennessee is a *general criminal law*, prohibiting conspiracies against intra-state trade.
2. A violation of its provisions by a corporation, is a *misdemeanor*.

⁷ *Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28.

3. Ouster is the *punishment* imposed by this Act, upon *foreign* corporations for engaging in a conspiracy against trade, in violation of its terms.

4. The Sherman Act is a general criminal law prohibiting conspiracies against *inter-state* trade.

5. The transaction at Gallatin, Tennessee, alleged to be a criminal conspiracy against trade, if a conspiracy, is a conspiracy against *interstate* trade, and a violation of the Sherman Act, and *not* a violation of the Anti-Trust Act of Tennessee.

6. The *interpretation* placed by the State Court upon the State Anti-Trust Act, is binding on this Court, and therefore the decision of that Court that this Act relates to intra-state commerce alone, is conclusive; but

7. The *application* of that statute, after being so interpreted by the State Court, to a "conspiracy" which is against *inter-state* commerce, so as to bring *it* within the operation of the *State* law, is not binding on this Court, and makes the *judgment* now sought to be reversed, involve a Federal question; and therefore

8. The State statute, as enforced and applied by the judgment of the State Court, is an unauthorized *regulation* of *inter-state* commerce by the State of Tennessee.

9. The State Anti-Trust Act is void because it denies to the Defendant the equal protection of the laws in the

respects mentioned on page 94 hereof; and because it denies to the Defendant due process of law for the same reasons.

10. A statute may be restricted to a *class*, if the members of the class are marked by some characteristic peculiar to themselves; but even then the statute, to be valid, must have relation to the peculiar characteristic. Although a statute relate to *all* the members of a class, yet if there be other persons, or classes, with characteristics similar to those peculiarities of the class to which the statute is made to apply, the statute is void, as *arbitrary class legislation*.

We respectfully submit that an examination of the record will reveal:

1. That two Federal questions are involved in this case; and

2. That they are not frivolous; but

3. Upon the contrary, both these questions are of such gravity that the judgment of the Supreme Court of Tennessee should be *reversed*.

Respectfully submitted,

JOHN J. VERTREES,

Attorney for Plaintiff in Error.

NASHVILLE TENNESSEE, March 12, 1909.

APPENDIX.

TENNESSEE CONSTITUTION.

(These sections of the Constitution are referred to on pages 96, 97, of this brief.)

“That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.” (Art. 1, Sec. 6.)

No man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.” (Art. 1, Sec. 8.)

“No person shall be put to answer any criminal charge but by presentment, indictment, or impeachment.” (Const. Tenn., Art. 1, Sec. 14.)

CODE OF TENNESSEE.

(These sections of the Code are referred to on page 121 of this brief.)

CONSPIRACY.—The crime of conspiracy may be committed by any two or more persons conspiring. . . .

(7) To commit any act injurious to public health, public morals, *trade or commerce*, or for the prevention or obstruction of justice or the due administration of the law. (Shann. Code, [Tenn.], Sec. 6693.)

MISDEMEANOR.—“Persons guilty of any conspiracy described in the preceding section, or of a conspiracy at common law, are guilty of a misdemeanor.” . . .

(6) Any conspiracy by two or more persons to do an act *injurious to public trade* as provided in Section 6693 Shan. Code (Tenn.), sec. 6736, sub-sec. 6.

FELONIES, MISDEMEANORS, DEFINED.—“All violations of law punished by imprisonment in the penitentiary or by the infliction of the death penalty, are, and shall be denominated *felonies*, and all violations of law punishable by fine, or imprisonment in the county jail, or both, shall be denominated *misdemeanors*.” (Acts 1873, Ch. 57; Shann. Code [Tenn.], Sec. 7185.)

MISDEMEANORS.—“When the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.” (Shann Code [Tenn.], Sec. 6437.

MISDEMEANORS, TWELVE MONTHS.—“All prosecutions for misdemeanors, unless otherwise expressly provided, shall be commenced within *twelve* months next after the offense has been committed.” (Shann. Code [Tenn.], Sec. 6942.

GAMING, SIX MONTHS.—“All prosecutions for unlawful *gaming* shall be commenced within *six* months after the offense has been committed.” (Shann. Code [Tenn.], Sec. 6943.

BILL UPON RELATION.

An action lies under the provisions of this chapter in the name of the State against the person or corporation offending in the following cases:

(1) Whenever any person unlawfully does or exercises any public offense, or franchise within this State, or any offense in any corporation created by the law of this State.

(2) Whenever any public officer has done or suffered to be done, any act which works a forfeiture of his office.

(3) And when any persons act as a corporation within this State without being authorized by law.

(4) Or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation.

(5) Or exercise powers not conferred by law.

(6) Or fail to exercise powers conferred by law and essential to the corporate existence. (Shann. Code [Tenn.], Sec. 5165.)

The Supreme Court of Tennessee holds that the procedure prescribed by this chapter, is also the proper pro-

cedure to be employed to oust foreign corporations. (*State ex rel v. Cumb. T. & T. Co.*, 114 Tenn., 194.)

ACTS OF THE LEGISLATURE OF TENNESSEE.

(*This Act is referred to on page 124 of this brief.*)

CHAPTER 89.

AN ACT to prohibit the keeping of any place for the purpose of encouraging, promoting, aiding, or assisting in any betting or wagering upon any kind of a horse race or horse races, or where any bet or wager is permitted to be made upon any horse race or horse races.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee:* That it shall be unlawful for any person, persons, or corporation, whether as owner, lessee, or otherwise, to keep or have under his, their, or its control or management, any room, hall, or house, or a track, path, road, or course, whether within or without an inclosure, for the purpose of encouraging, promoting, aiding or assisting in any bet, or wager upon any kind of a horse race or horse races, or where any bet or wager is permitted to be made upon any kind of a horse race or races, whether by book-making, auction pools, French mutuals, or in any other manner or by any other device whatsoever.

SEC. 2. *Be it further enacted,* That any person violating any of the provisions of Section 1 of this Act shall be guilty of a felony, and, upon conviction in a court of competent

jurisdiction, shall be fined not less than two hundred and fifty dollars, nor more than five hundred dollars, and be imprisoned in the penitentiary not less than one year nor more than three years.

SEC. 3. *Be it further enacted*, That any corporation violating any of the provisions of Section 1 of this Act shall, upon conviction in a court of competent jurisdiction, be fined not less than two hundred and fifty dollars, nor more than five hundred dollars, and, in addition to such fine, its charter shall, by such court, be adjudged to be forfeited, and its corporate existence and right to do business in this State shall cease and determine.

SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.
Passed February 6, 1907.

EVIDENCE THAT PRICE OF OIL WAS NOT ADVANCED AS
RESULT OF THE "CONSPIRACY."

(This evidence is referred to on page 29 of brief.)

The price of oil was advanced about the same time that it was advanced at Gallatin, at all other points in Tennessee, thus conclusively showing that these countermanding transactions at Gallatin, were not the cause of the one-cent advance in price there.

It will also be seen from this list of prices that the price of oil at the towns around Nashville, corresponding to Gallatin, were as follows:

	<i>Per gallon.</i>
1903—Gallatin, June 5.....	13½ cents
Gallatin, October 27.....	14½ cents
Record, p. 218.	
Springfield, July 7.....	13½ cents
Springfield, October 10.....	14 cents
Springfield, October 27.....	15 cents
Record, p. 221.	
Murfreesboro, June 5.....	14 cents
Murfreesboro, October 20.....	14½ cents
Murfreesboro, October 24.....	15 cents
Record, p. 220.	
Lebanon, June 5.....	13½ cents
Lebanon, October 24.....	15 cents
Lebanon, November 20.....	15½ cents
Record, p. 219.	
Franklin, June 5.....	13½ cents
Franklin, October 20.....	14 cents
Franklin, October 24.....	15 cents
Record, p. 218.	

Prices at Gallatin, where it is alleged that the Standard Oil Company had “pre-empted” the market, and secured for itself a monopoly, were as follows:

	<i>Per gallon.</i>
1903—January 1	14½ cents
April 28	14 cents
June 5	13½ cents
October 27	14½ cents
1904—March 8	14 cents
May 24	13½ cents
1905—January 7	13 cents
February 22	12½ cents
April 24	12 cents
1906—June 15	11½ cents
August 18	11 cents
July 5	11 cents

Record, pp. 218, 224, 229, 234, 368.

Thus it appears, the uncontradicted evidence is, that the price of oil at Gallatin did not advance because competition had been suppressed as the result of countermanding these orders (Record, p. 537), and also that the price of oil has been steadily *reduced* in Tennessee, from year to year.

3
No. 160.

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DEC 4 1909

JAMES H. MCKENNEY,

CLERK

No. 21168.

Supreme Court of the United States.

OCTOBER TERM, 1909.

STANDARD OIL COMPANY (of Kentucky),
Plaintiff in Error,

VS.

STATE OF TENNESSEE, ex. rel., etc.

IN ERROR TO THE SUPREME COURT
OF TENNESSEE.

BRIEF OF

JOHN J. VERTREES,
Counsel for Plaintiff in Error.

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Supreme Court of the United States.

October Term, 1909.

STANDARD OIL COMPANY (of Kentucky)

Plaintiff in Error,

vs.

STATE OF TENNESSEE, ex. rel., etc.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

May It Please the Court:

The case is a proceeding to *punish* the Plaintiff in Error (hereinafter called the Defendant) as a foreign corporation, for an alleged violation of the Tennessee Anti-Trust laws.

The Attorney-General of Tennessee filed a bill in the name of the State, upon his relation, in a Chancery Court of Tennessee, to stop the Defendant from doing business in, and to oust it from, the State, on the ground that it had

been guilty of engaging in a conspiracy or combination in restraint of trade, in violation of the State Anti-Trust law.

There was a decree of ouster. The Defendant appealed to the Supreme Court of the State; and the decree was affirmed.

Thereupon, the Defendant sued out this writ of error in this Court.

The State of Tennessee entered a motion at the last term to dismiss the writ of error in this case on the ground that no federal question was involved, but that motion was *overruled*.

The Anti-Trust Act of Tennessee, which the Defendant was found guilty of violating, is as follows:

ANTI-TRUST ACT OF TENNESSEE.

Acts of 1903, Chapter 140.

AN ACT to declare unlawful and void all arrangements and contracts, agreements, trusts or combinations made with a view to lessen or which tend to lessen free competition in the importation or sale of articles of domestic growth, or of raw material; to declare unlawful and void all arrangements, contracts, agreements, trusts or combinations between persons or corporations, designed, or which tend to advance, reduce or control the price of such product or article; to provide forfeiture of the charter and franchise of any corporation organized under the

laws of this State violating any of the provisions of this Act; to prohibit every foreign corporation violating any of the provisions of this Act; to prohibit every foreign corporation violating any of the provisions of this Act from doing business in this State; to require the Attorney-General of this State to institute legal proceedings against any such corporations violating the provisions of this Act, and to enforce the penalties prescribed; to prescribe penalties for any violation of this Act; to authorize any person or corporation damaged by any such trust, agreement or combination, to sue for the recovery of such damages, and for other purposes.

SECTION 1. That from and after the passage of this Act all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are hereby to be against public policy, *unlawful*, and void.

SEC. 2. *Be it further enacted*, That any corporation chartered under the laws of the State which shall violate any of the provisions of this Act shall thereby *forfeit its charter* and its franchise and its corporate existence shall thereupon cease and determine. Every *foreign corporation* which shall violate any of the pro-

visions of this Act is hereby denied the right to do, and is *prohibited from doing business* in this State. It is hereby made the duty of the *Attorney-General* of this State to *enforce these provisions by due process of law*.

SEC. 3. *Be it further enacted*, That any violation of the provisions of this Act shall be deemed, and is *hereby declared* to be destructive of full and free competition and A CONSPIRACY AGAINST TRADE, and any *person or persons* who may engage in any such conspiracy or who shall, as principal, manager, director, or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders made in furtherance of such conspiracy, shall, upon conviction, be *punished* by a *fine* of not less than one hundred dollars nor more than five thousand dollars, and by *imprisonment in the penitentiary* not less than one year nor more than ten years; or, in the judgment of the Court, by either such *fine or imprisonment*.

SEC. 4. *Be it further enacted*, That any *person or persons*, or *corporation* that may be injured or *damaged* by any such arrangement, contract, agreement, trust, or combination, described in section 1 of this Act, may sue for and *recover* in any Court of competent jurisdiction in this State of any person or persons or corporation operating such trusts or combination, the *full consideration* or sum paid by him or them of any goods, wares, merchandise or articles, the sale of which is controlled by such combination or trust.

SEC. 5. *Be it further enacted*, That it shall be the *duty of the Judge of the Circuit and Criminal Courts*

of this State specially to *instruct grand juries* as to the provisions of this Act.¹

This Act was construed in *State v. Standard Oil Company*, 117 Tenn., 619.

The Court held that the word "importation" in the first section of the Act was *inaccurately* used, and that the Act should be restricted to, and operated on, *intra-state* commerce alone.

It was also held that *corporations* guilty of violating the provisions of this Act could *not* be indicted and fined, but that *persons* could be both fined and imprisoned.

It was further held that "the *only* distinction made in the statute between natural persons and corporations violating its provisions, is in the *punishment* provided" (117 Tenn., 664). Also that the Attorney-General of the *State*, not the District Attorney-General, is "the proper officer to enforce such *punishment*."²

In the *present* case it was further held that *persons* violating the provisions of this Act are guilty of a "felony," and must be proceeded against by indictment or presentment, and are entitled to a common-law jury trial with all the *defensive rights* secured under that procedure. It is *not* said what the *grade* or character of the offense is when committed by a corporation, but it is said that *corporations*

¹All italics are ours.

²117 Tenn., 653.

when proceeded against for violating the Act, are *not* entitled to any of those rights. They can be proceeded against by bill in equity upon relation, without a jury trial, where *they can not* plead the statute of limitations, and where they cannot require guilt to be established beyond a reasonable doubt. Consequently in reading the Anti-Trust Act it must be read *as construed* by the Supreme Court of Tennessee.

GENERAL STATEMENT.

Stated as the State Court found it to be, the case is this:

The Defendant, the Standard Oil Company (of Kentucky) was doing business in Tennessee. It had an agency established at Gallatin, Tennessee, and a large quantity of coal oil stored in tanks there for sale. The retail grocery merchants at Gallatin dealt in coal oil, and were customers of the Defendant.

The *Evansville Oil Company*, of Evansville, Indiana, had not done business in Tennessee. In 1903 it sent a traveling salesman or drummer into that territory to sell coal oil. He went to Gallatin and took orders from several merchants, for a number of barrels of oil. The orders ranged from five to ten barrels each. The oil was to be delivered to the merchants at Gallatin in about thirty days, and was *to be shipped* from Oil City, Pennsylvania, *via* Cairo, Illinois, instead of Evansville, Indiana, and to be *delivered* directly to the purchasers at Gallatin, Tennessee.

Thereafter, but before the oil had been shipped out from Oil City, the agent of the Standard Oil Company went to Gallatin, and agreed with several of these merchants to give them ten gallons of oil per barrel to countermand their purchase-orders. Four of the merchants accepted the proposition and countermanded them.

The Attorney-General of Tennessee contends, and the Supreme Court of Tennessee sustained him in the contention, that this transaction was a *criminal conspiracy* in restraint of trade, under the anti-trust act of Tennessee.

The Standard Oil Company and two of its agents were indicted. The Company and one agent were convicted in the Court below, and fined \$5,000 and \$3,000, respectively.

On appeal, the judgment was affirmed as to the agent, but reversed as to the Company, on the ground that the statute did not impose a *fine* on corporations for violating its provisions, but punishment of an altogether different character—*dissolution* as to domestic corporations, and *ouster* as to foreign ones.

Thereupon *this* bill in equity upon relation was brought.

The principal questions now relied on by the Defendant to reverse the case are these:

First point: The alleged criminal agreement (if it be an offense) is an offense against the Federal law, the "Sherman Act," and not an offense against the laws of Tennessee,

and for this reason: the transaction at which it was leveled, and affected, was strictly and purely one of interstate commerce, and the offense was necessarily an offense against interstate, and not intrastate commerce, which Congress alone can regulate.

Second point: The Tennessee statute is a denial of the equal protection of the laws and of due process of law, and consequently a violation of the Fourteenth Amendment. The respects wherein it is a violation of the Amendment are stated with particularity elsewhere, in this brief.³

Third point: The statute of limitations.

These points were made by the Defendant in its pleading, in the assignment of errors in the State Supreme Court, in argument, in a petition for a rehearing, and in the assignment of errors filed with its petition for a writ of error. They were both considered and decided *adversely* to the Defendant, by the Supreme Court of Tennessee.

The foregoing general statement of the questions involved will now be followed by this

STATEMENT OF THE CASE.

The original bill was filed on the 16th day of March, 1907. It charged that a certain *transaction* which had taken place at *Gallatin*, in Sumner County, Tennessee, on

³See *post*, p. —.

the 12th day of October, 1903, was a combination, or agreement, or conspiracy, against trade, and a violation of the State Anti-Trust Act.

An *amended* bill was filed on the 14th day of November, 1907. It charged that a certain *contract* entered into between the Defendant and the Cassety Oil Company of Tennessee, on the 30th day of October, 1899, but which *expired* October 30, 1904, was also a conspiracy, or combination, or agreement against trade in violation of the State Anti-Trust law.

A demurrer to the *amended* bill was sustained by the Chancellor, and that bill was *dismissed*.⁴ On the appeal, it was said by the Supreme Court of Tennessee, in the *opinion*, that under the view that the Court took of the case, it was not necessary to *discuss* the action of the Chancellor on the amended bill.⁵ The Court, nevertheless, *decreed and adjudged* that the decree of the Chancellor should be in all things *affirmed*,⁶ thereby affirming the decree of the Chancellor sustaining the demurrer and dismissing the amended bill.

While the contract with the Cassety Oil Company was made in *Ohio*, and not in Tennessee,⁷ and was a mere con-

⁴Record, p. 360.

⁵Record, p. 499.

⁶Record, p. 540.

⁷Record, questions 109-113, p. 183.

tract of *agency*⁸ which violated no law, State or Federal,⁹ and entered into, upon advice of counsel in Ohio that it was entirely legal,¹ in view of the decree of the Supreme Court *affirming* the decree of the Chancellor with respect to the *amended bill*, and no complaint or writ of error by the State of Tennessee, the questions presented by the amended bill, are eliminated and not up for review here.

The *only* transaction remaining to be considered in the present proceeding, is that which took place at *Gallatin* on the 12th day of October, 1903.

The Defendant, the Standard Oil Company (of Kentucky) had been doing business in Tennessee for more than twenty years. The first statute imposing *conditions* of admission upon foreign corporations of the character of Defendant, was passed in 1893, at which time the Company was *already* doing business in the State. It complied with that statute, and filed a copy of its charter, as required, in the office of the Secretary of State, on the 21st day of September, 1893, and obtained a license or permit to do business; and it has done business in Tennessee under that license ever since.¹

⁸Record, pp. 329, 330.

⁹*Waller A. Wood M. & R. Machine Co. v. Greenwood Hardware Co.*, 75 S. C., 378; *Kevil v. The Standard Oil Co.*, 9 L. R. A. (N. S.), 449, note; (Ohio).

¹Record, p. 1; Ques. 147, 148, p. 186; Ques. 123, p. 184.

The Anti-Trust Act, which it is charged was violated, was passed on the 23d day of March, 1903—nearly ten years *after* the Company had been doing business in the State. The transaction, alleged to be a criminal violation of the Anti-Trust Act, occurred on the 12th day of October, 1903.

The present bill to oust the Company for that alleged transgression, was filed on the 16th day of March, 1907—nearly *three and one-half years after* the offense had been committed.

The bill admits that the Appellant has claimed the right to do, and has been doing, business in Tennessee since the 21st day of September, 1893.²

Certain Acts were passed by the Legislature of the State³ making it unlawful for a *foreign* corporation to do business in Tennessee, without first filing an authenticated copy of its charter with the Secretary of State. The bill concedes that the Defendant complied with these requirements, on the 21st day of September, 1893.⁴

The Acts referred to do *not* have the effect to make foreign corporations complying with these requirements, domestic ones.⁵

²Record, p. 1.

³Acts 1891, Chap. 122; 1895, Chap. 81.

⁴Record, p. 1.

⁵*Markwood v. South. Ry. Co.*, 65 Fed. Rep., 817; *Cir. Ct. East Dist. Tenn; Hollingsworth v. Southern Ry. Co.*, 86 Fed. Rep., 353; *St. Louis, etc., Ry. Co. v. James*, 161 U. S., 545, 562, 563.

The Company has built up a great business in Kentucky, Tennessee, Mississippi, Louisiana, Alabama, Georgia and Florida.⁶

The Company has been a success. That success in a great measure is due to its *system of doing business*—the system of *tank-distribution* and delivery. Its oil is transported in *bulk* from the refineries in iron tank-cars, to the Company's "bulk stations." These are stations established on railway lines in the cities and principal towns, and at which the Company has stationary iron tanks, into which the oil is transferred *in bulk*, from the tank-cars, by gravity. "Tank wagons" are kept at these "bulk stations" to distribute the oil to the Company's customers. These tank wagons are iron tanks permanently mounted on wagons, and they go out into the country from the stations as far as *twenty-five miles*.⁷

In some parts of the country the roads get bad in wet weather, rendering it impossible for the heavy tank wagons to go out. The Company under such conditions sends out oil in ten-gallon ("milk") cans, by ordinary light vehicles, so as to supply its trade.⁸

That part of the country in which the Company does business is divided up into "districts" under the immediate control of agents, known as "Special Agents." Sub-agents

⁶Record, p. 315.

⁷Record, Ques. 115, p. 196.

⁸Record, Ques. 35, p. 348.

are in charge of the bulk stations, and they are known as "Local Agents." In 1903, the special agent in charge of Middle Tennessee was *Mr. C. E. Comer*, with his office at Nashville. The local agent at Gallatin was *O'Donnell Rutherford*, and Gallatin was in the Nashville District.

"Drivers" have charge of the tank wagons and deliver oil therefrom to customers. "Inspectors" and traveling "salesmen" go over the districts from time to time. *Mr. C. E. Holt* was a traveling salesman in the Nashville district, with headquarters at Nashville.

No oil is sold from the wagons to consumers. They sell and deliver to merchants and dealers only.⁹

The Company has bulk stations in forty-nine counties in Tennessee. Seventy-nine tank wagons operate from these stations as bases of supplies.¹⁰

The Company also has seven "barrel stations" in Tennessee—that is, stations from which oil is sent out in barrels only.¹

Its stations have cost \$166,000. Its teams, tank wagons, etc., are worth \$30,000. It pays annually as license fees and taxes over \$10,000, and it pays inspection fees amounting to about \$40,000 per annum.²

⁹Record, p. 192.

¹⁰Record, pp. 193, 194.

¹Record, p. 194.

²Record, p. 195.

This system was not built up in a day, nor in a year, but through years. Its advantages are obvious. The merchant can get oil when he wants it, and as he wants it. There are no long "delays" in shipments. The small merchant is not obliged to order a car-load, nor to "club" with others (even when he can do so) in order to get the advantage of car-load lots. The Company will deliver any quantity from twenty gallons up as desired. The oil is delivered at the merchant's door, and measured before his eyes. This means full measure. There is no leakage and evaporation, as is the case when barrels are used; no loss in shipment; no leakage while stored. There are no drayage and cartage charges.³ The system is one that, by reason of its convenience, "absorbs the business."⁴

This thoroughly organized system gives the Defendant Company an advantage over its competitors. *They* now appreciate it, and have begun to adopt the same system themselves. Some of them have introduced the bulk-station and tank-wagon system into the four cities of Tennessee, *but have not yet extended it to the towns.*⁵

The price of oil has varied, of course, but under the Company's system, *prices have been gradually and steadily reduced.*

Tables showing the price of oil at all times from January 1, 1903, to July 6, 1907 (when the tables were made

³Record, pp. 195, 196.

⁴McIlwaine, Ques. 50, p. 178.

⁵Record, pp. 194, 195.

out), at fifty-six of the principal cities and towns of Tennessee, are in the record, and they show how prices have been reduced, and this, too, in a State in which it is *charged* that the Company had "pre-empted" the oil market, and at many places where the company has had no competition for years.⁶

The prices of oil, delivered from tank wagons, at Gallatin (where the "conspiracy" existed), have been as follows:

GALLATIN TANK-WAGON DELIVERY.⁷

1903.	January 1.	14½ cents per gallon.
1903.	April 28	14 cents per gallon.
1903.	June 5.	13½ cents per gallon.
1903.	October 27	14½ cents per gallon.
1904.	March 8	14 cents per gallon.
1904.	May 24	13½ cents per gallon.
1905.	January 17	13 cents per gallon.
1905.	February 22	12½ cents per gallon.
1905.	April 24	12 cents per gallon.
1906.	June 15	11½ cents per gallon.
1906.	August 18	11 cents per gallon.
1907.	July 5	11 cents per gallon.

The dates above given are the dates at which changes in price took place. The prices remained the same between dates as fixed at the last preceding date.⁸

⁶Record, Ques. 134, p. 46; Ques. 16, p. 51.

⁷Record, pp. 218, 224, 234, 238.

⁸Record, Ques. 147, p. 199.

THE SITUATION AT GALLATIN OCTOBER 12, 1903.

Mr. J. E. Comer was the Company's "Special Agent" at Nashville. As such, he was in control of Middle Tennessee. Gallatin is twenty-eight miles distant from Nashville, and in Sumner County, in Middle Tennessee. O'Donnell Rutherford was the "local agent" at Gallatin, in charge of the sub-station there. C. E. Holt was the traveling salesman in that territory. Mr. C T. Collings, vice president, was in general control, with headquarters at Cincinnati, Ohio. Salesman Holt and Local Agent Rutherford received all their orders from Mr. Comer, Special Agent. Mr. Comer received his orders from Mr. Collings, vice president. Mr. Collings fixed the prices and gave them to Mr. Comer, and he gave them to the salesmen and local agents. No one in Tennessee had authority to alter the prices, or to depart from them in any way.⁹ The Company had storage tanks of large capacity at Gallatin, from which it sold and distributed oil to its customers by means of tank-wagons, within a radius of *twenty-five miles*. It had 15,363 gallons of oil in its storage tanks at Gallatin in October, 1903.

By reason of its complete system, the Company had *practically* a monopoly of the business. No competitor had tanks and delivery wagons in Tennessee, except at the principal cities—Nashville, Memphis, Knoxville, and Chattanooga.¹⁰

⁹Opinion, Record, p. 530.

¹⁰Record, p. 195.

The *Evansville Oil Company*, an Indiana corporation, was engaged in the oil business at Evansville, Indiana. It had never done any business at Gallatin, Tennessee. The Attorney-General says it is "one of the few *independent*" companies. It is this kind of an "independent" company—one of a number of companies that have *combined* under the names of the "United States Pipe Line" and the "Pure Oil Company" to compete with the Standard Oil Company. The members of this self-styled "independent" combination have *parceled out* the United States into districts, among themselves, under an agreement which *restricts* each member's business to his *allotted* district. Tennessee was allotted by this "independent" trust, to the Evansville Oil Company.¹

In October, 1903, Mr. Rosemon, a traveling salesman of that company, visited *Gallatin*, to sell oil. On the *fifth* day of that month he took orders for various quantities of oil from divers merchants there—for 62 barrels in all. Among others were these:

S. W. Love—Order for 10 barrels.

J. E. Cron—Order for 10 barrels.

L. C. Hunter—Order for 5 barrels.

W. H. Lane—Order for 5 barrels.

Total—30 barrels.

The oil was *to be delivered* to these merchants at Gallatin, about November 1, 1903, in original packages (bar-

¹Record, pp. 122, 123.

rels), and was *to be shipped* from Oil City, *Pennsylvania*, via Cairo, Illinois.²

Salesman Rosemon turned over these orders to his principal, the Evansville Oil Co., *at Evansville, Indiana*, on the 8th day of October, 1903.³ The oil could have been delivered at Gallatin from Oil City in "two or three weeks."¹ It arrived at Gallatin on the 3d day of November, 1903,² but the orders which the four merchants above named had given had been *countermanded* in the meantime by telegraph, on the *twelfth* day of October, 1903—over three weeks *before* the oil reached Gallatin.³ The countermanding telegrams were received by the Evansville Oil Company on the twelfth, and accepted—that is, *assented* to by it.⁴ And although a car-load of *seventy-two* barrels of oil was shipped to Gallatin, nevertheless, neither Mr. Love, nor Mr. Lane, nor Mr. Cron was ever asked by the Evansville Oil Company to take any of it.⁵ That is to say, the countermanding orders were received and assented to *before* the oil was shipped from Oil City. When the representative of the Evansville Oil Company was asked on the witness-stand whether the

²Record, pp. 126, 505.

³Record, p. 103.

¹Record, p. 126.

²Record, pp. 111, 117.

³Record, p. 41.

⁴Record, p. 110.

⁵Record, pp. 41, 56, 70. *Ten* barrels in excess of all orders taken.

oil had been *shipped out* on the 12th day of October, when the countermanding telegrams were received, he replied that it had been "*ordered*" shipped—clearly showing that it had *not* been shipped out, but that the *Evansville*, Indiana, office had merely "*ordered*" the office at *Oil City*, Pennsylvania, to ship it.

The settled *custom* of the trade is that orders given by merchants for oil, may be countermanded at any time before shipment, at the pleasure of the purchaser.⁶

Indeed, the Supreme Court of Tennessee admits, in view of this custom and the evidence, that *if* the merchants had made the countermands of their own motion, "*unmoved* by combination or agreement" with the Defendant or its agents, "there would be no ground for action."⁷

A *practice* has sprung up out of this custom, which is *not fair trade, but they all do it*. That is, for one oil dealer to induce a merchant to countermand an order given to a competitor, but not yet filled. It is practiced by the Standard Oil Company's salesmen; and the salesmen of its competitors, the "independents" (in the combination) *practice it on the Standard Oil Company*.⁸

⁶Record, q. 195-8, pp. 202, 203; p. 316; q. 44-7, p. 53; q. 17-19, p. 39; q. 37, p. 82; pp. 254, 255; q. 8, p. 67; q. 195-8, p. 202.

⁷Opinion, Trans., p. 539.

⁸Record, p. 316; q. 95-8, p. 202.

The State Court finds that Salesman Holt went to Gallatin on the 12th day of October by the direction of Mr. Comer to see about "holding his trade," and to get the merchants, who for years had been regular customers of the Standard Oil Company, to *countermand* these orders. The Supreme Court of Tennessee says that Mr. Comer authorized Mr. Holt to secure these countermands by gifts of oil, if necessary.⁹ Mr. Holt and the four merchants above mentioned, *separately* came to agreements; but they were all substantially the same. The agreement with each was that in consideration of so many gallons of oil (300 in the aggregate or 10 gallons per barrel for every barrel previously ordered) of the Standard Oil Company, to be delivered as called for, the merchants would, (and they did), countermand the orders given on the 5th day of October to the Evansville Oil Company. These agreements were all made on the 12th day of October, 1903. Countermanding telegrams were written out and signed by the merchants, but paid for and sent immediately by Salesman Holt. They were all like that sent by Mr. Love, which was as follows:

"GALLATIN, TENNESSEE, Oct. 12, 1903.

To Evansville Oil Co., Ind.:

Kindly countermand our order for 10 barrels of oil.
S. W. LOVE."

This is all there is in the Gallatin transaction.

⁹Record, p. 538.

There was no *agreement* or understanding that any of these merchants should *buy oil thereafter*, from the Standard Oil Company alone.

There was *no* agreement or understanding that they should *not* buy any more oil from the Evansville Oil Company. So far as any *agreement* was concerned, they were free to purchase again from that Company, at pleasure. *It was not a continuing, or working agreement.* It was a gift direct, that was completed and ended the moment it was made, and the countermanding telegrams sent.

Nevertheless, this agreement is said, and was adjudged by the Supreme Court of Tennessee, to be a combination or arrangement or agreement or *conspiracy against trade*, and a criminal violation of the State Anti-Trust Act.

The Supreme Court of Tennessee concedes that "neither the countermand of the order, nor the giving the oil were in themselves criminal, and either could have been done by the parties acting *without concert*, but they could not be to have the order countermanded in consideration of the *gift of oil, for the purpose* of lessening competition, or if such countermand was *intended* to effect that purpose."¹

The Attorney General states that soon after this transaction the Defendant *advanced* the price of its *inferior grade* of oil "one cent a gallon."

¹*Holt's Case*, 117 Tenn., 623; Opin. Record, p. 539.

It is true that the *grade* of oil which the Defendant was selling from its *bulk*-stations in tank-wagons, was not of as high grade as that which the Evansville Oil Co. proposed to sell in *barrels*. But it is also true that it was sold at a *lower* price. And it is also true that the Defendant itself handled a higher grade of oil in *barrels*, but that its sale of *high-grade* barrel oil was not one-half of one per cent of its sales of lesser grade oil in bulk. This is not denied by the Supreme Court of Tennessee, and part of it is admitted.²

Assuming the facts to be precisely as stated by the Supreme Court of Tennessee, the case is this:

1. By a settled usage of the trade, it is allowable for merchants dealing (without "concert") to countermand orders for oil—for a good reason, or for a bad reason, or for no reason at all.³

2. The orders were given by *Tennessee* merchants, to an Indiana dealer. They were given in *Tennessee*, to an *Indiana* drummer, for oil to be delivered in the future. The oil was *to be transported* from Oil City, *Pennsylvania*, by way of Cairo, Illinois, and to be delivered to the Gallatin merchants, the purchasers, in Tennessee.

3. The Gallatin merchants, and the Standard Oil Company's agent came to the agreement that in consideration

²See Opin., Trans., pp. 538, 539, 537. And for the evidence which proves it, see Appendix to this brief, pages ———

³Opinion, Trans., p. 539.

of the *gift* of certain quantities of oil, the merchants would countermand the orders they had given to the Evansville Oil Company; and they did then countermand them accordingly.

4. The agreement was *restricted to these orders* alone, and related to *nothing else*.

5. The *purpose* of the agreement was to *protect* oil which the Standard Oil Company *then* had stored in its tanks at Gallatin, for sale, *from the COMPETITION of the oil to be imported by the Evansville Oil Co.*⁴

6. Upon these facts the Supreme Court of Tennessee held that the agreement was a criminal violation of the *State anti-trust law*.

THE CRIMINAL PROCEEDINGS IN 1904.

At the May Term, 1904, of the Circuit Court of Sumner County, Tennessee, an indictment was found against the Company and its agents, Holt and Rutherford; and they were all subsequently put on trial. Mr. Comer, the Special Agent in charge at Nashville, was not indicted. Rutherford was acquitted. The Company and Salesman Holt were found guilty, and both were *fin*ed. On appeal the judgment as to Holt was affirmed by the Supreme Court of Tennessee, but *reversed* as to the Company. The indictment was quashed as to it, on the ground that a *corpora-*

⁴Opinion, Trans., pp. 526, 527.

tion could neither be indicted nor fined, under the terms of the Anti-Trust Act, but should be proceeded against by bill of ouster, in equity, upon the relation of the Attorney General under section two of the Act. That case is known as *Standard Oil Company vs. The State*, 117 Tenn., 618. In accordance with the opinion therein expressed, the bill in *this* case was filed by the Attorney General, as hereinbefore explained, and the decree rendered herein, forfeiting the right to "do business" in Tennessee.

ASSIGNMENT OF ERRORS.

The Supreme Court of Tennessee erred:

1. In not holding and decreeing that the said Act, Chapter 140, of the Acts or General laws of the State of Tennessee for the year 1903, having been *adjudged* to relate and *apply* to the said transactions at Gallatin, is void as a regulation of interstate commerce in that it is a violation of Article 1, Section 8, Sub-section 3 of the Constitution of the United States:

2. In holding and decreeing that the transaction complained of in the bill at Gallatin, Tennessee, and alleged to be illegal, constitutes an offense against the laws of the State of Tennessee, and in not holding that it was a transaction of interstate commerce beyond the power of the State of Tennessee to regulate, and exclusively under the power, or regulation of the Congress:

3. In not *adjudging* and decreeing that said transaction, if an offense against, or violation of, any law was and is an offense against, and violation of, the laws of the United States relating to interstate commerce, and not an offense against, or violation of, the laws of the State of Tennessee:

4. In *adjudging* and decreeing that the Act passed by the Legislature of Tennessee, known as Chapter 140 of the Acts or General Laws of 1903, and which it is decreed this petitioner, the Standard Oil Company (of Kentucky) has

violated, is valid, and does not deprive it of its rights, liberty or property without due process of law, and deny to it the equal protection of the laws:

5. In not adjudging and decreeing that the said Act, Chapter 140 of the Acts of 1903, of the Legislature of Tennessee, is void, for that it is in violation of the XIV amendment to the Constitution of the United States, in that it deprives the petitioner of its rights, liberty, and property, without due process of law, and denies to it the equal protection of the law.

6. In not holding and decreeing that the said Act which is Chapter 140 of the General laws of the State of Tennessee for the year 1903, deprives this Defendant, the Standard Oil Company, a corporation organized under the laws of Kentucky, of its rights, liberty and property, without due process of law, and denies to it the equal protection of the law in these respects, namely:

(a) It arbitrarily and capriciously denies to the Defendant, a foreign corporation, the right to a trial by jury, for a violation of its provisions.

(b) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions the right of trial by jury, granted to natural persons, charged with violating its provisions.

(c) It arbitrarily, capriciously, and unreasonably denies to corporations charged with violating its provisions, a trial according to the laws of the land for the trial of

criminal charges whereby the defense of the statute of limitations can be pleaded and relied upon, while it grants the same to natural persons charged with violating its provisions.

(d) It arbitrarily, capriciously and unreasonably denies to corporations charged with violating its provisions a trial according to the procedure prescribed by the laws of the land for the trial of criminal charges, whereby the guilt of the party charged must be established beyond a reasonable doubt in order to convict, and obliges the corporation to answer and defend in a procedure whereby it may be convicted upon a mere preponderance of the evidence, or upon less evidence than such as is required to establish guilt beyond a reasonable doubt, when it grants to natural persons charged with its violation, the right to be tried according to that procedure prescribed by the laws of the land under which the accused must be proven guilty beyond a reasonable doubt, in order to convict.

7. The Court erred in finding and decreeing that the transactions at Gallatin, Tennessee, between Holt and Rutherford, Agents of this petitioner Company, or either of them, and the four merchants at Gallatin, Tennessee, in the bill mentioned, or any of them, constituted a combination, conspiracy, or agreement or understanding forbidden by the statute, which is Chapter 140 of the Acts of the General Assembly of the State of Tennessee for the year 1903.

8. In not dismissing the bill of complaint.

BRIEF.

I.

The anti-trust Act of Tennessee, upon which the present proceeding is based, is not a statute prescribing the *conditions* on which foreign corporations are *admitted* to do business in Tennessee, neither is it a statute prescribing the procedure to be employed against corporations to punish them for *corporate* wrong-doing.

It is a *general criminal law* denouncing combinations, agreements, and conspiracies against trade, as crimes, and prescribing the *punishment* to be inflicted for committing those crimes.⁵

Carroll vs. Greenwich Ins. Co., 199 U. S., 409.

Cargill Co. vs. Minnesota, 180, U. S., 468.

Fidelity Mut. Life Ins. Co. vs. Mettier, 185 U. S., 332.

Am. Smelting & Ref. Co. vs. Colorado, 204 U. S., 103.

II.

A violation of the provisions of this anti-trust Act of Tennessee, is a *conspiracy against trade*.

⁵This proposition is discussed at page 85.

The offense, when committed by a corporation, is a misdemeanor.⁶

Acts of Tennessee, Chapter 140.

Code of Tennessee (Shannon) §§ 6736, 6993, 6694, 6942-5.

III.

Corporations may be punished for crime, although they are not capable of having a guilty or criminal intent. Upon grounds of *public policy*, the guilty *intent* of the agents who act for them may, and indeed oftentimes should, be *imputed* to the corporations, and the corporations be punished accordingly.

N. Y. Cent. R. R. vs. United States, 212 U. S., 495.

IV.

Foreign trading corporations doing business in Tennessee, are entitled to the equal protection of the laws, like natural persons.

V.

The anti-trust Act of Tennessee, as construed *and applied* in the present case, is void, because it is a regulation of interstate commerce.⁷

Gen. Oil Co. vs. Crain, 209 U. S., 228.

Reovick vs. Penna., 203 U. S., 507.

People vs. Hawkins, 157 N. Y., 1.

Jerver vs. The Carolina, 66 Fed. Rep., 1013.

Knop vs. Monongahela, etc., Co., 211 U. S., 485.

Adams Ex. Co. vs. Kentucky, 214 U. S., 221.

⁶This proposition is discussed at page 137.

⁷This proposition is discussed at page 44.

VI.

The anti-trust Act of Tennessee upon which the present proceeding is based, as construed and applied, is unconstitutional and void, because it denies to the Defendant the equal protection of the laws, and in these respects namely: It accords to *natural persons* accused of violating its provisions:

1. The right to a preliminary inquiry by a grand jury; and
2. The right to be put to answer the charge by indictment or presentment; and
3. The right to a trial by a jury; and
4. The right to an acquittal unless guilt be established by evidence *beyond a reasonable doubt*; and
5. The right to interpose the statute of limitations (when it has run) as a defense.

*All these defensive rights are accorded to natural persons, but denied to corporations. That denial is capricious, arbitrary and unreasonable, and therefore a denial of the equal protection of the laws.*⁸

Crowley vs. United States, 194 U. S., 473.

23 Am. & Eng. Ency. Law, 948 (2 Ed.).

Turley vs. State, 3 Heisk. (Tenn.) 11.

⁸This proposition is discussed at page 111.

VII.

The transactions at Gallatin, Tennessee, alleged in the present proceeding to be a conspiracy against trade, if an unlawful conspiracy at all, is a conspiracy against *inter-state trade*—a violation of the Act of Congress, the Sherman Act, and *not* a violation of the anti-trust act of Tennessee.⁹

Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211,
229, 230.

Northern Securities Co. vs. U. S., 193 U. S., 344.

Railroad vs. Husen, 95 U. S., 465.

United States vs. Swift & Co., 122 Fed. Rep., 534.

VIII.

The Defendant cannot be punished in the present proceeding for a violation of the Sherman Act, because (a) the pleadings are not framed to that end (2) and the *State* court has no jurisdiction to entertain a proceeding for that purpose.

Transcript of Record, Bill p. 1, 4.

Minn. vs. Northern Securities Co., 194., U. S., 48.

Lowe vs. Lawler, 130 Fed. Rep., 633.

IX.

The statute of limitations in the case of a violation of the provisions of this Act by a corporation, is *one* year.

⁹This proposition is discussed at page 57.

More than three years elapsed between the commission of the alleged offense, and the institution of the suit in this case; and the bar of the statute is a complete defense.¹

Turley vs. State, 3 Heisk. (Tenn.), 11.

Code of Tenn. (Shannon), § 6942-5; §§6736, 6993, 6694.

¹This proposition is discussed at page 132.

ARGUMENT.

The errors assigned² present three questions, namely:

1. The Tennessee anti-trust statute as enforced and *applied* by the decree of the Supreme Court of Tennessee is void under Section 8, Article 1, of the Constitution of the United States, as a regulation of interstate commerce.

Congress has legislated with respect to conspiracies, and combinations against interstate commerce, that legislation being known as the "Sherman Act." The conspiracy which the Defendant and the Gallatin merchants engaged in, was against *interstate* commerce, and therefore an offense against the Sherman Act, and *not* an offense against the *State* Anti-Trust Act.

2. The Tennessee anti-trust statute is void under the XIV Amendment to the Constitution of the United States because it denies to the Defendants the equal protection of the laws and deprives it of its property without due process of law.

The Tennessee Anti-Trust Act is a *general criminal law*. It is *not* a law relating to corporations *as such*, neither is it a law prescribing the *conditions* on which foreign cor-

²They were assigned with the petition for the writ of error, Trans., 544.

porations are admitted to Tennessee. It is a *general criminal law*, leveled at conspiracies against trade, whether committed by persons or corporations, equally and alike.

Persons accused of violating its provisions, must be proceeded against by indictment, or presentment. They are entitled to be tried by a *jury*. Their guilt must be established *beyond a reasonable doubt*. They can rely upon the statute of limitations as a defense, when it has run.

But *corporations* accused of violating the provisions of this act, may be proceeded against by *bill in equity* upon relation, where they are *denied* (1) the judgment of a grand jury as to whether they shall be put to answer the charge by indictment or presentment; (2) *denied* the right of trial by jury; (3) *denied* to have their guilt established beyond a reasonable doubt, and may be found guilty upon a bare *preponderance* of the evidence; and (4) *denied* the right to interpose the statute of limitations as a defense. This discrimination between persons and corporations for *the same offense* is arbitrary and unreasonable, and a *denial of the equal protection of the laws*.

3. The proceedings against the Defendant under this statute are in the nature of criminal proceedings, and the plea of the Statute of limitations of one year is available as a defense whether the procedure be in a court of law, or a court of chancery, and whether they be by bill in equity,

or indictment. In this case the statute had run, and therefore is a good defense.

Before proceeding to discuss these questions it will not be unprofitable to acquaint the court with the

HISTORY OF THE TENNESSEE ANTI-TRUST ACT.

In the year 1889 the State of *Texas* enacted an anti-trust law, the thirteenth section of which was as follows: "*The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*" And in the year 1893 the State of *Illinois* enacted an anti-trust law, the nineteenth section of which was identically the same as this thirteenth section of the *Texas* statute.

In 1897 the Legislature of Tennessee enacted an anti-trust law, the *fourth* section of which was a *verbatim* copy of this nineteenth section of the law of *Illinois*.³

The *Illinois* statute was pronounced unconstitutional (as a piece of *arbitrary, class* legislation), by the Federal Court sitting in that State, because of the provision excepting farmers and stock-raisers, hereinbefore set out.⁴

In 1900 the Tennessee statute of 1897 came up before the Supreme Court of Tennessee for review, in *State v.*

³ Acts 1897, Ch. 94.

⁴ *Union Sewer Pipe Co. v. Connelly*, 99 Fed. Rep., 354.

*Schlitz Brewing Co.*⁵ This *Connelly Case* was presented as authority when the Schlitz Brewing Co. case was heard, but the Tennessee Court refused to follow it. "We decline to follow that decision," said Judge Caldwell, "unsupported by discussion or the citation of authorities, as it is, over our own conviction, and in the face of the numerous cases mentioned in this opinion."⁶

Accordingly, on the 8th day of June, 1900, that Court declared that the Tennessee statute of 1897 was valid, and that the classification recognized by its fourth section was not arbitrary, but just and reasonable.⁷

But the Connelly Case was brought to *this Court*, and on the 10th day of March, 1902, it was *affirmed*. This Court held that the exception in favor of stock-raisers and farmers *was* capricious and arbitrary, and rendered the whole act unconstitutional and void.⁸ This decision, of course, paralyzed the Tennessee Act, forasmuch as it contained identically the same fatal provision. To meet that decision, the Legislature of Tennessee, on the 23d day of March, 1903, *re-enacted* the statute (which was chapter 94 of the Acts of 1897) with the exception that this vitiatory provision in favor of farmers and stock-raisers (section 4) was omitted. The Act of 1903 is the one now involved.

⁵104 Tenn., 715.

⁶104 Tenn., 737.

⁷*State v. Schlitz Brewing Co.*, 104 Tenn., 715.

⁸184 U. S., 554.

The Federal questions now presented, have not been considered heretofore by the Supreme Court of Tennessee.

The Attorney General of Tennessee contended in the Supreme Court of that State on the trial of this case, that this Act *had* been "assaulted" in *Schlitz Brewing Co. v. The State*, 104 Tenn., 715, and in *Standard Oil Co. v. The State*, 117 Tenn., 618, 676, on the ground that it denied the equal protection of the laws and deprived the Defendant of property without due process of law, and that in both cases the assault had been "repelled" by that Court.⁹

That Court admitted in the opinion in the present case, that the Schlitz Brewing Co. case had been "disapproved" by *this* Court, and "inferentially disapproved" by *that* Court also in one other respect, but it said nevertheless that it remained "unshaken" as to the proposition that it is *not necessary* under this Anti-Trust Act, to have an *antecedent criminal conviction* in a court of law, in order to sustain a bill of ouster in equity, but that the bill can be filled at once.¹

Nevertheless, we submit that it will be seen upon an examination of the two cases referred to, that in *neither* of them was either of the *Federal* questions which are *now* presented, considered or decided. True it is that the Court in the *Schlitz Brewing Company Case* held that the Act

⁹Brief, Printed Record, p. 496, side page 683.

¹Opin. Rec., p. 527, side page 726.

does not require that there shall be an antecedent criminal conviction at law, before a bill of ouster upon relation can be filed, for the *stated* reason that the proceedings are *independent* and cumulative. In *that* case it was expressly held that the Act prescribes (1) criminal punishment, (2) pecuniary civil liability, (3) and a forfeiture of the right to do business.²

It was there held that the provision for the forfeiture of the right to do business was "*apart from, and independent of, a criminal prosecution,*" and for *that* reason an *antecedent* criminal conviction was *not* essential, as a basis for a bill of ouster in equity. The Court said that it was "entirely without dependent connection with either the criminal responsibility, or the pecuniary liability prescribed by the statute."³

In *Standard Oil Company v. The State*, 117 Tenn., 618, it was held that the statute did *not* subject an offending corporation to a *criminal* prosecution *at all*; that a *corporation* could neither be indicted nor fined under the statute. That is to say: The *Schlitz Brewing Company Case* held that the statute *does* provide for a criminal prosecution *and also* for a bill of ouster in equity against corporations, but that these were cumulative, disconnected, and wholly independent procedures, and consequently that an antecedent criminal conviction is not necessary to support the

²104 Tenn., 748.

³104 Tenn., 751.

bill of ouster in equity. In the *Standard Oil Company Case* (Holt's Case), it was held that there can be no criminal conviction or criminal procedure against corporations at all. In the *present* case the Court said with respect to the two cases just mentioned, that the Schlitz Brewing Company Case remained "unshaken" as to the point that the *antecedent* criminal conviction was not necessary, in order to maintain the bill of ouster in equity.⁴ The decision to the effect that the Act provided for and allowed a criminal prosecution, undeniably is shattered by the later decision which holds that the statute does not authorize a criminal prosecution at all. It follows that the first construction must now be taken to have been an erroneous interpretation of the statute.

The Schlitz Brewing Company Case did hold that an antecedent criminal conviction was not necessary to support a bill of ouster, *not* because a criminal prosecution was not provided for (for the Court said that it *was*), but because the procedures were *independent* and cumulative. The *later* case holds that an antecedent criminal prosecution is not necessary, because (it says) there can be no criminal conviction, antecedent or subsequent, at all. True it is, that both cases agree that a bill of ouster in equity may be maintained independently of criminal procedures, but for altogether different reasons, and upon *directly contradictory* interpretations of the statute. Consequently

⁴Record, opinion, p. 521.

they cannot be cited as *concurring* authorities for the same proposition.

Neither of the cases is authority for the contention that this statute does not deny the equal protection of the laws, nor deprive this Company of property without due process of law under the Fourteenth Amendment. *That question was neither considered nor decided in either of the cases referred to.* The first decision of that question ever made by the Supreme Court of Tennessee, was made in the present case, which this writ of error is prosecuted to reverse.

It is well settled that even though a statute may have been enforced by repeated decisions in which constitutional objections were *not* presented and considered, when they *are* presented, the previous decisions are regarded as being without force.⁵ It results that the Federal question now presented is *res integra*.

This Act was construed by the Supreme Court of the State in *State v. Standard Oil Company*, 117 Tenn., 619, 642. As construed, it means that it is to be restricted to, and to operate upon, *intra-state commerce alone*. The Court said that the word "importation" in the first section was "inaccurately" used. The Act relates alone to intra-state commerce.⁶ No *corporation* can be either indicted or

⁵94 U. S., 6412, Lewis Suth. Dam., sec. 484; *Gribble v. Wilson*, 101 Tenn., 612.

⁶117 Tenn., 642.

fined, under this Act.¹ It inflicts a "severe punishment" on offending corporations—dissolution as to domestic corporations, and ouster with respect to foreign ones.² "*The only distinction made in the statute, between natural persons and corporations violating its provisions, is in the punishment provided.*"³ The Attorney General of the State, not a district attorney general, is the proper officer "*to enforce such punishment.*"⁴ The appropriate procedure is a bill in equity in the name of the State by the Attorney General as relator. Such is the construction which this Act has received.

It is no answer to say (as the Attorney General does) that in the criminal case⁵ this same Defendant, the Standard Oil Company, insisted, and successfully, that it could neither be indicted nor fined under the Tennessee Anti-Trust Act. The reason why it was held in that case that it could not, was that the *statute had substituted* a bill in equity for the indictment, and ouster for the fine; and the criminal procedure in that case was based upon this statute. The Act *could* have provided for criminal proceedings, but (the Court said) it did not.

¹*Ib.*, 654.

²*Ib.*, 649.

³*Ib.*, 664.

⁴117 Tenn., 653.

⁵117 Tenn., 618.

The present proceeding is a bill of ouster in equity. *Here* the question is presented, and for the first time, whether *this* procedure is in conflict with the *Constitutions* of Tennessee and the United States. In the former case⁷ the question was as to the *meaning* and *interpretation* of the statute, and the Court concerned itself only with an *interpretation* of the statute. *Here*, the question is as to the *validity* of that interpreted statute—whether it squares with the *Constitutions* which must control.

Our contention is that it does not. Our first contention is that it has (very properly) provided for the *indictment* and regular *common-law trial* of *persons* who violate its provisions, yet unjustly *denies* that form of procedure and trial to *corporations* that violate its provisions. If the point be well taken, it is obvious that the Act denies to accused corporations the equal protection of the laws, in that it accords to *persons* the right of trial by jury (with certain recognized established *rights of defense*) as the Constitution of Tennessee requires, but denies these rights to *corporations*, thereby refusing to them that right of trial which the State *Constitution* gives to persons, and therein denying the equal protection of the laws, and violating the Fourteenth Amendment.

It would be a denial of the equal protection of the laws if the right to be charged by indictment and tried by a jury, had not been secured by the Constitution or laws of

⁷117 Tenn., 618.

the State, the same as it is with that right so secured, for the reason that these rights being accorded by the statute to *natural* persons, "Equal Protection" forbids them to be denied to corporations.

It is upon this principle that the Standard Oil Company now contends that when *persons* are given the right of trial by jury; are allowed a form of trial in which they can interpose the defense of the statute of limitations; and are required to be proven guilty beyond a reasonable doubt, *corporations* to which all these rights are *denied*, are denied the equal protection of the laws.

The Standard Oil Company does not complain of the fact that different *kinds* of punishment are inflicted. Fines could have been imposed on both persons and corporations, but it was not obligatory on the Legislature to impose them. Imprisonment could not possibly have been imposed on both, since corporations cannot be corporally imprisoned. Therefore the fact that one who *can* be imprisoned is imprisoned, while one who *cannot* be imprisoned is *expelled* from the State, or dissolved in lieu of imprisonment, we have all along conceded, can be no just ground of complaint.

This brings us to the

FIRST PROPOSITION.

The Anti-Trust Act of Tennessee, upon which the present proceeding is based, as applied and enforced by the

In *Welton v. Missouri*, 91 U. S., 275, the Court said:

"The general power of the State to impose taxes in the way of license upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the *sale* of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods or indirectly from them through a license to the dealer; but if such tax conflict with any power deposited in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a *personal* license."

The fact that *property* in Tennessee enjoys the protection of the laws of the State, is not enough *of itself*, to justify State taxation.⁷

The fact that the *parties* themselves are not regularly engaged in interstate commerce, is immaterial, because the Sherman Act makes no distinction as to classes. It provides that *every* contract or conspiracy in restraint of trade shall be illegal.⁸

⁷*General Oil Co. v. Crain*, 209 U. S., 211, 236.
Moody, J., dissenting.

⁸*Lowe v. Lawler*, 208 U. S.

A party is entitled to be protected against a violation of his constitutional right, whether that violation result from the *terms* of a statute, or from the *manner* of its enforcement.⁹

It is illustrated by *Ex parte Young*, 209 U. S., 144. It was contended for Mr. Young that no Federal question under the XIV Amendment, was presented by the bill. The Court said that the question really to be determined under this objection is—

“Whether the acts of the Legislature, and the orders of the Railroad Commission, *if enforced*, would take property without due process of law, and although that question might *incidentally* involve a question of *fact*, its solution nevertheless is one which raises a Federal question.” 209 U. S., 144.

Whenever a statute of a State invades the domain of legislation which belongs exclusively to the Congress, it is void, no matter under what class of powers it may fall, or how closely it may be allied to powers conceded to belong to the States.¹

The “police power” of a State is extensive, but it cannot be exercised over a subject confided exclusively to Congress—as interstate commerce has been.²

⁹*General Oil Co. v. Crain*, 209 U. S., 211, 228.

¹*Henderson v. Mayor, etc.*, 92 U. S., 260, 271.

²*Railroad v. Husen*, 95 U. S., 471, 473, 474; *Brennan v. Titusville*, 153 U. S., 209, 300.

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¹*Henderson v. Mayor, etc.*, 92 U. S., 260, 271.

²*Railroad v. Husen*, 95 U. S., 471, 473, 474; *Brennan v. Titusville*, 153 U. S., 209, 300.

“Whatever may be the nature and reach of the “police power” of the State, it cannot be exercised over a subject confided exclusively to Congress.”³ As said in *Crutcher v. Kentucky*, 141 U. S., 59–62, the decisions of this Court are clear to the effect that:

“Neither license, nor *indirect* taxation of any kind, nor any system of State *regulation*, can be imposed upon interstate, any more than upon foreign, commerce; and that all acts of legislation producing any such results are, to that extent, unconstitutional and void.”

Any State *statute*, or *contract between persons*, which *obstructs* commerce, “regulates” it, within the contemplation of the Constitution; for to limit, restrict, or *obstruct* commerce, is to “regulate” it.⁴

As said by Mr. Justice Brewer in *In re Debs*, 158 U. S., 564:

“If a *State*, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary *association of individuals* within the limits of that State, has a power which the State itself does not possess?”

³Russell on Police Power, 149; *R. R. v. Husen*, 95 U. S., 465.

⁴*Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 229, 230; *Northern Securities Co. v. United States*, 193 U. S., 344; *Railroad Co. v. Husen*, 95 U. S., 465; *In re Debs*, 158 U. S., 564; *Lowe v. Lawlor*, 208 U. S., 304.

This was quoted with approval in *Lowe v. Lawler*, 208 U. S., 304.

“Regulation, to any substantial extent, of such a subject by any other power than that of Congress after Congress has itself acted thereon, even though such regulation is *effected* by means of *private contracts* between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by *individuals* as by the State itself. In both cases it is an attempt to regulate a subject which for the purposes of regulation has been, with some exceptions, such as are stated in *Mobile County v. Kimball*, 102 U. S., 691 (*and other cases cited*), exclusively granted to Congress; and it is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other.”⁵

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 247, this Court said that:

“Although the jurisdiction of Congress over commerce among the States is full and complete . . . it does not acquire any jurisdiction over *that part* of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination *also* covers and regulates com-

⁵*Addyston Pipe & Steel Co. v. United States*, 175 U. S., 230.

merce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described, covers both commerce which is wholly within a State, and *also* that which is interstate.

“In regard to such of these Defendants as might reside and carry on business in the same State where the pipe provided for in any *particular* contract was to be delivered, the sale, transportation and delivery of the pipe by them under *that* contract would be a transaction wholly within the State, and the statute (*the Sherman Act*) would not be applicable to them in *that* case.”

That is to say: when a combination of manufacturers enter into a *general* agreement to regulate the sale, price and delivery of merchandise under the contracts for sale and delivery in their own States, as well as in the States of each other, *particular* contracts which are interstate transactions are subject to the operation of the Sherman Act, and the *particular* contracts which are intra-state transactions are subject to the State Anti-Trust Act.

In *that* sense, and in that sense only, do the two systems of laws operate at the same time. In such cases one system operates upon the *particular* contract in its relation to a certain class of transactions—intrastate transactions. The other system operates upon another particular contract in its relation to another and different class of transactions—interstate commerce transactions. But still the operation of each is separate and distinct. They do not overlap.

For this reason it is all-important to determine to *which* class of transactions the particular combination or conspiracy agreement relates.

In Prentice & Egan's Commerce Clause of the Constitution of the United States, 336, it is said that "it is equally clear that State statutes and the Federal statutes upon this subject cannot both operate upon the *same* contract at the same time."

The power of the United States, and the power of the States, to regulate commerce do not overlap. They are separate and distinct. Interstate commerce is beyond the reach of any State power. Intrastate commerce is beyond the reach of Federal power.

That which does *not* belong to commerce is *within* the *police power* of the States. That which *does* belong to commerce is within the jurisdiction of the United States.⁶

This does not mean that a State cannot enact legislation which, to a *limited* extent, will *affect* the *instrumentalities* of interstate commerce. This distinction, namely: that the States cannot legislate with respect to interstate commerce at all, but may legislate with respect to the *instrumentalities* of interstate commerce, and thereby affect it *indirectly* to some extent, has often been overlooked. This distinction has been most clearly stated by Hammond, J., in *L. &*

⁶*The License Cases*, 5 How., 599; *Austin v. Tennessee*, 179 U. S., 377.

N. R. R. Co. v. R. R. Commissioners of Tennessee, 19 Fed. Rep., 709, when he said:

“The power of Congress to regulate such an instrumentality of commerce (*steamboats*) is practically unlimited, because it may reach the *commerce* itself, as well as its *agencies*; wherefore there is no need to look to the *character* of the *regulation* in determining the power, but only to the *character* of the *commerce*. But when we turn to the power of the *States*, we must necessarily scrutinize *both*. The *definition* of interstate commerce, as given in these cases, does not change; it is fixed, whether Congress has acted or not acted, and the real question as to the *States*, always is two-fold: Does the proposed law act upon the *commerce itself*, or does it act *only* on the *instrumentality*? If the first, it is *always* void; if the second, its validity *depends on the circumstances*. Here lies the fallacy of this, and all, legislation which overlooks the not always broad distinction between regulating the *commerce itself* and the *instrumentalities*, and we have the authority of the Supreme Court in the next case cited, for saying it is often disregarded.”⁷

Upon interstate commerce the States may lay no burden whatever, because *that* amounts to a regulation of commerce; and the regulation of interstate commerce belongs to Congress alone. On the other hand, it is frequently said that “in matters which are *auxiliary* to commerce,” or “which may be used in *aid* of commerce,” or which “indi-

⁷The Court cites *Mobile County v. Kimball*, 102 U. S., 691, 702.

rectly" affect interstate commerce, the powers of the States, in the absence of Federal action, are unimpaired.⁸

Thus it appears that when State legislation hits *inter-state commerce itself*, it is not necessary to inquire as to the nature or character of the regulation. Whatever its nature may be, it is void—void *because it regulates inter-state commerce*; regulates commerce wholly beyond the reach of the State. But when the State legislation relates to the *instrumentalities* of interstate commerce, instead of to interstate commerce itself, such legislation may or may not be void, according to the circumstances of the case. In *such* case the *nature* or character of the *regulation*, and also of the *commerce* itself, must *both* be considered in order to determine the question.

To illustrate: A statute of Louisiana provided for the appointment of gaugers to measure and determine the capacity of coal-boats and coal-barges. These, for the most part, came down the Mississippi from States above, to New Orleans. A fee of \$5.00 for each barge, and \$10.00 for each boat, was to be paid the gauger; and it was made unlawful to sell coal from any boat or barge before it had been inspected and gauged. This act was held to be valid.⁹

⁸*Prentice v. Egan*, Commerce Clause, Fed. Const., 189; *Leloup v. Mobile*, 127 U. S., 640, 648; *Robbins v. Taxing Dist.*, 120 U. S., 489; *Mobile v. Kimball*, 102 U. S., 691, 702.

⁹*Pittsburg, etc., Coal Co. v. La.*, 156 U. S., 590.

As will be observed, the statute related to the *instrumentalities* of commerce, and affected *commerce*, indirectly and slightly. It related merely to the measurement of *boats* used in commerce, but did not relate to the facility of the transportation, and of the loading and unloading.

Upon the other hand, in *Rearick v. Pennsylvania*, 203 U. S., 507, an ordinance of the Borough of Sunbury, Pennsylvania, made it unlawful for any person to *sell* by retail on the streets, or by traveling from house to house, foreign or domestic goods not of the party's own manufacture, without a license. Rearick did this—by selling and taking orders for an *Ohio* corporation. This ordinance was held to be void, and for the reason that the transaction to which it related was interstate commerce *itself*; because “interstate commerce cannot be taxed at all, even though the same amount of tax be laid on domestic commerce, or that which is carried on solely within the State.”¹

“Regulation” is not necessarily the imposition of a *burden*. The *Federal Statutes*, for illustration, authorize railroad companies whose roads are operated by steam, to carry passengers and property from State to State, and to *connect* with roads of other States. This statute is a regulation of commerce, but obviously it imposes no *burden*.²

¹*Robbins v. Shelby Taxing District*, 120 U. S., 489, 497.

²*R. R. Co. v. Richmond*, 19 Wall., 584; *Richmond v. Railway Co.*, 33 Iowa, 422.

There are *State* enactments, also, which, while imposing no burden, directly, are, nevertheless, void. For example, a State law, acting *outside* of the State, prescribing and fixing *reasonable* rates, would impose no burden, and yet will offer a possibility of conflict between regulations of different States, and would be void as a regulation of interstate commerce.”³

The *statute* of a State which “regulates” interstate commerce, is void.

Any *contract* between persons which *obstructs, limits, or restricts* interstate commerce, is also void.⁴

“Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts, or otherwise, the prohibition is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.”⁵

³Prentice & Egan, Commerce Clause, Fed. Const., 189.

⁴*Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 229, 230; *Northern Securities Co. v. United States*, 193 U. S., 344; *R. R. Co. v. Husen*, 95 U. S., 465.

⁵*United States v. Freight Ass’n*, 166 U. S., 324, 326.

Every contract, combination or conspiracy, the necessary effect of which is to restrict competition in interstate commerce, is in restraint of trade, within the meaning of the Sherman Act.⁶

"Where a *contract* to buy, sell, or exchange goods, to be transported among the several States, operates to *restrain* trade, it is a violation of the Federal law."⁷

The Sherman Act superseded and abrogated all conflicting State statutes and general laws.⁸

The omission of Congress to make regulations with respect to such subjects indicates the intention that they shall be free from all restrictions or impositions by any State.⁹

But Congress has acted; it has legislated with respect to combinations, conspiracies, trusts, and agreements to lessen competition in interstate commerce or trade. The "Sherman Act" of 1890¹ is as broad and sweeping as it can be.

⁶*United States v. Swift & Co.*, 122 Fed. Rep., 534.

⁷Prent. & Egan Com. Clau. Fed. Cons., 329; 38 Am. St. Rep., 223.

⁸*Railway v. Hefley*, 158 U. S., 99; *Railroad v. Horne*, 106 Tenn., 76.

⁹*Leisy v. Hardin*, 135 U. S., 109; *State v. Scott*, 98 Tenn., 257, 260; *Schollenberger v. Penn.*, 171 U. S., 23.

¹21 Stat. Law, 502; Supp. Rev. Stat., 322.

The argument down to this point has been directed to show that—

1. Congress alone can regulate commerce among the States;

2. Any State *statute, contract, or agreement* between persons, that *hits or obstructs interstate* commerce, “regulates” that commerce, within the meaning of the Constitution of the United States;

3. *State* legislation may relate to the *instrumentalities* of interstate commerce to a limited extent, but it cannot regulate interstate commerce *itself*, at all;

4. Congress, in the exercise of its power to regulate interstate commerce, enacted the Sherman Act, or Anti-Trust Act of 1890, which relates to all contracts and combinations against interstate commerce; and

5. *Every* contract, combination, or conspiracy which *obstructs* interstate commerce, which *restricts* competition in interstate commerce is *within* the Sherman Act, and therefore is *beyond*, and not within, the provisions of any *State* anti-trust act whatsoever.

With these principles to guide, we are now prepared to consider the transaction at Gallatin, Tennessee, which it is *claimed* is a criminal violation of the Tennessee Anti-Trust Act, and which transaction, we insist, if a conspiracy at all, is a conspiracy against *interstate* commerce, and a vio-

lation of the *Sherman* Act, and therefore *not* a violation of the Anti-Trust Act of *Tennessee*.

The transactions with the merchants at Gallatin were substantially the same (as already shown), and hence, for the purpose of the argument, may be treated as one. So considered, we have two distinct and definite transactions to contemplate: (1) The *Rosemon*, *executory* agreement with the Gallatin merchants, made on the 5th day of October, 1903, when he took their orders; (2) and the *Holt* agreement with the same merchants, made on the 12th day of that same month, for the countermanding of those orders.

The first, or *Rosemon* transaction, was an interstate commerce transaction, pure and simple. The Evansville Oil Company, the seller, was a citizen of *Indiana*, located and doing business in *that* State. Its traveling salesman, Mr. *Rosemon*, went to Gallatin, *Tennessee*, to solicit orders and make sales of oil. The oil it proposed to sell was at Oil City, *Pennsylvania*, and was, by the terms of the agreement, *to be shipped* to Gallatin, *Tennessee*, by way of Cairo, *Illinois*.⁹ The Gallatin merchants were citizens of *Tennessee*, doing business at Gallatin, in *Tennessee*. *Drummer* *Rosemon* took the orders of these merchants *in Tennessee*, for the *sale, transportation, and delivery* by the *Indiana* seller, of its oil, then stored in *Pennsylvania*, to the purchasing merchants, *at Gallatin, Tennessee*. It was an *executory* contract, inasmuch as it was for future deliv-

⁹Record, pp. 126, 505.

ery. It is characterized by an unusual number of interstate commerce features. *It was interstate commerce pure and simple.*¹

Such was the Rosemon agreement, the transaction at which the agreement of October 12th, now denounced as a criminal "conspiracy," was leveled.

On the 12th day of October, 1903, but before the oil had been shipped out from Oil City, Salesman Holt, the agent of the Standard Oil Company, and these same Galatin merchants, came to an agreement. This agreement was, that in consideration of 300 gallons of oil (in the aggregate), to be delivered by the local agent of the Standard Oil Company, free of charge, as wanted, these merchants would *countermand* or cancel the *orders* they had given for the thirty barrels of oil to the Evansville Oil Company; and they *did* then countermand them by telegraph. *This is all there was of the "conspiracy."*

It was not continuous. It was not a working agreement. It hit directly and alone at the Rosemon sale, and was exhausted and ended in the stroke. It struck at, and struck down, *Indiana* competition. It neither directly nor indirectly related to any sale by, or purchase from, the Standard Oil Company. It did not assume to bind the merchants to buy the Standard Oil Company's oil. Neither did it assume to bind them not to purchase oil from the Evans-

¹*Ware v. Mobile Co.*, 209 U. S., 412.

ville Oil Company. They were free to send in new orders at any time. It did assume to countermand certain *existing* orders given for thirty barrels, and to defeat the transportation and delivery of that oil; and it did contemplate that the merchants should refuse to receive that particular oil, if tendered. *This conspiracy directly affected and related to the interstate commerce transaction of October 5, and that alone.* It was meant to, and it did, hit that, and nothing but that. If a conspiracy, it was a conspiracy against trade, which was purely interstate trade. The *competition* which it destroyed or affected, was the interstate competition of the Evansville Oil Company. Really, this was conceded by the Supreme Court of Tennessee in Holt's case, when it said that—

“The evidence offered, tended to prove an agreement, conceived and effected by the Standard Oil Company and its agents, to *protect* the oil of the Standard Oil Company then stored in Gallatin, from the *competition* of that *about to be imported* and offered for sale by a *competitor*, and *not to protect* that of the *Evansville* Oil Company *yet to be transported* there.”²

That Court repeated and adopted that language in the present case, saying:

“The charge upon which the Plaintiffs in Error were indicted, tried, and convicted, is the alleged

²*Standard Oil Co. v. The State* (Holt's Case), 117 Tenn., 646, 647.

making of an unlawful contract and agreement with *S. W. Love* to lessen and destroy competition in the sale of coal oil which the Standard Oil Company had imported into this State and *had, at the time* of the agreement, *stored* in its storage-tanks at Gallatin, and there offered for sale. The charge is that the agreement was made to *protect* oil, *already* imported, and *not* oil *to be* imported. The evidence offered tended to prove an agreement conceived and effected by the Standard Oil Company and its agents, to *protect* the oil of the principal *then stored* in Gallatin, *from competition with that about to be imported and offered for sale by a competitor*, and not to *protect* that of the Evansville Oil Company yet to be transported there.

"A combination affecting interstate commerce, is none the less a violation of the Federal anti-trust statute and punishable under it, where the agreement made *incidentally* affects intrastate commerce; and the same rule will apply to combinations made in violation of the statute of the State upon the same subject, where interstate commerce is *incidentally* affected. If it were otherwise, neither the Federal nor the State laws could be enforced in any case.

"The importation of oil to be made by the Evansville Oil Company, was only the *occasion*, the *incentive*, of the conspiracy charged in relation to that theretofore imported by the Standard Oil Company.³

"It is true the oil of the Standard Oil Company had been an article of interstate commerce, but it was not when the agreement with *S. W. Love* was made.

³Opinion, Record, pp. 526, 527.

It was then *at rest* in this State, and was *subject* to its *revenue* laws and the *police power* of the State. That it was subject to the revenue laws is conceded by the Standard Oil Company, and it had taken out a license and paid the revenue required and imposed by the laws of the State.”⁴

Nevertheless, that Court thought that the transaction at Gallatin was a criminal agreement, which *directly* affected intrastate commerce, and consequently that it was within the State Anti-Trust Act.

In an earlier case, the learned Judge (Neil, J.), who delivered the opinion of the Court in the present case, remarked that “legal conclusions cannot always be safely reached by pressing the processes of *logical illation* to their ultimate results.”⁵

This rule, we submit, the learned Judge has ignored in the present case, since the “logical illation” to which he has arrived appears to have been reached *substantially* thus:

The Standard Oil Company at the time this criminal agreement was made, had a large quantity of oil on hand, stored in its tanks at Gallatin, Tennessee. It had imported this oil, but it was then *at rest* in Tennessee, and subject to the “*revenue laws*” and “*police power*” of the State. The Holt agreement was *not* made to protect the oil of the Evansville Oil

⁴Opinion, Record, pp. 526, 527.

⁵115 Tenn., 521.

Company about to be transported to Gallatin, but it was made *to protect* that oil of the Standard Oil Co. which had already been imported and was then “at rest” at Gallatin, from *competition* with that oil of the Evansville Oil Co. about to be imported for delivery under a contract of sale, at Gallatin.⁶

Or, stated in still other terms, the basis of the “illation” appears *in substance* to be this:

The motive and purpose of the Standard Oil Company was to *protect* oil which it then had in stock at Gallatin for sale “from *competition* with that (oil) about *to be imported* and offered for sale by a competitor.” The merchants, as intelligent business men, were bound to know that this was the motive and purpose of the Standard Oil Company.⁷ Inasmuch as the oil thus sought to be protected from the *competition* of oil about to be imported from Indiana, was *then at rest* in Tennessee, subject to the revenue laws and police power of the State, the transaction was a criminal conspiracy in restraint of *domestic* trade, and *directly* in violation of the State Anti-Trust Act. For these reasons it affected *inter-state* commerce only *incidentally*, and therefore is *within* the State statute.⁸

This view we respectfully submit is *wholly erroneous*.

The occasion or incentive which caused the parties to make the agreement, or the purpose they had in mind

⁶Holt's Case, 647; Opinion, Neil, J.; Record, pp. 526, 527.

⁷175 Tenn., 675.

⁸117 Tenn., 674; Opinion, Record, pp. 526, 527.

when making it, *may* sometimes be circumstances which taint the agreement and make it *illegal*—but they are not *elements* which determine the *kind* of commerce directly affected. Whether such an agreement be an offense against interstate commerce, or whether it be an offense against intrastate commerce, is to be determined alone by the *nature* and *terms* and *effect* of the *agreement itself*. Motive, purpose, and incentive are of comparatively little importance in the determination of *that* question—that is, to determine the *kind* of commerce actually affected.

“Where the contract,”

Says Mr. Justice Peckham,

“affects interstate commerce *only* incidentally, and *not* directly, the fact that it was not designed or intended to affect such commerce, is simply an additional reason for holding the contract valid, and not touched by an act of Congress. *Otherwise*, the design prompting the execution of the contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of *no* importance.”⁹

If it be *conceded* (for argument) that the *purpose* of the Standard Oil Company in entering into the agreement, was to lessen competition in the sale of the oil which it then had stored at Gallatin, and that the fact that oil was *about to be imported* by the Evansville Oil Company for

⁹*Addyston Pipe & Steel Co. v. United States*, 175 U. S., 234.

sale there, was the *occasion* and *incentive* for the conspiracy, and that the agreement was "*conceived* and *effected*" to *protect* the oil then stored at Gallatin, we are still left in the dark as to the *nature* of the agreement itself. All the facts above stated may tend to show that the character of the agreement was bad, that it was meant to hit and cripple *trade*, but they are not facts which enable us to certainly determine *which* trade—whether that offense is *primarily* against interstate commerce, or primarily against intrastate commerce. That question can be determined alone by a consideration of the *nature* and *effect* of *the agreement itself*—not of the mere *motive*, or purpose which the *parties* had in mind, when they made it.

When the purpose is to protect oil at rest from the *competition* of oil about to be transported to Tennessee by destroying the contract which calls for the transportation, the offense is against interstate commerce.

But if the circumstance that the *motive* or *purpose* of a combination is to protect merchandise which is at *rest* in the State, from the competition of merchandise of like character, *about to be imported* by a competitor, makes the combination one against *domestic* commerce (as the Supreme Court of Tennessee holds), obviously it withdraws from the control and protection of the Federal Statutes almost every important transaction in the field of commerce. If *that* be the correct view, there can remain but *few* combinations for the Sherman Act to operate upon.

The reason is, that merchandise must always be *somewhere*, in some *State*. As a rule it is *in transit* only for short periods of time. The view of the Supreme Court of Tennessee seems to be that so long as it is in actual *transit* it is subject to Federal laws, but so soon as it comes *to rest*, it is subject to the "revenue" laws and "police power" of the State, and that the moment merchandise is "at rest," subject to these State laws, conspiracy *agreements* entered into by the owners of that merchandise to protect it from *competition* on the part of *other non-resident importers*, are *local* like the merchandise itself which is "at rest," even though such agreements *directly* relate to and destroy *contracts* which are purely of an *inter-state* commerce character. According to *that* Court, when the *property* sought to be protected from the competition of like articles, about to be imported for sale for a competitor, is "at rest" in Tennessee, *agreements* obstructing and restraining such importation, take their complexion from the fact that the *property* is *at rest*, which is sought to be protected, and *not* from their own nature, effect and terms.

The error of this view will more clearly appear from illustrations: Suppose A and B, merchants at Gallatin, regular customers of the Standard Oil Company, but *without any oil in stock* or "at rest" at the time, of their own motion, and out of dislike for Mr. Rosemon, and with the view of keeping him out of the trade at Gallatin, had *agreed* with Merchants Love, Lane, Cron, and Hunter to pay them \$41.50 (the value of 300 gallons of oil) to countermand

their orders, and did pay the money, and the four merchants did countermand—would not *that* agreement be a conspiracy against trade, *if* this Holt agreement was one?

Suppose, again, that by reason of lack of transportation or destruction of bridges by tornadoes, it had happened that the Standard Oil Company chanced to have *no oil* “at rest” at Gallatin, or in Tennessee, at the time this Holt agreement was made, would it have been any the less a conspiracy than it would have been if the Company had chanced to have its tanks full of oil “at rest?” Yet, in both these supposed cases, it will be perceived, there was *no oil at rest* in Tennessee, to “protect.” In the case first supposed, A and B, *retail* merchants, did not expect to bring in oil to sell in competition with the Standard Oil Company. In the last case supposed, the Standard Oil Company expected to bring in oil in the near future, but had none on hand at the time. In both cases, the element which was *controlling* and determinative (according to the *opinion* of the Supreme Court of Tennessee), is *wholly wanting*, namely: the fact that the purpose was to “protect” oil which was *then actually at rest* in Tennessee. According to that view, neither of the *supposed* agreements could possibly be a conspiracy, forasmuch as there was *no oil at rest* in Tennessee for the agreement to protect. Yet it is plain that in their *nature, effect, and terms*, both the supposed agreements obstruct and restrict the *importation* of oil into Tennessee for sale, by a *non-resident competitor*, *as much* as the agreement now complained of does.

In *Hopkins v. United States*, 171 U. S., 603, it was insisted that the fact that the stock-yards at Kansas City were in two States (Kansas and Missouri) was a material fact in determining the character of the business done; but the Court held that it was not of the "slightest materiality" since the *business* done at these yards so situated was intrastate in character. The converse of the rule is of course true also. That the yards are in one State instead of two, and already in use and located, would not keep the business from being of an interstate character.

The *principle* which must apply and control, can depend upon no mere *accident* of the case. Commerce, whether interstate or intrastate, deals with merchandise, but it is not itself merchandise. It is traffic *in* merchandise. Agreements in restraint of trade, conspiracies against trade, are not *merchandise*, but they are *agreements*. Whether the merchandise which the agreement *protects from competition*, is already on hand for sale, or yet to be imported for sale, is wholly immaterial—a mere accident of the case. Whether the merchandise that *would* come in and compete, *but for the conspiracy*, is the fruit of an interstate commerce contract, or of an intrastate commerce contract is material and all-important. Whether the conspiracy agreement hits interstate commerce, or hits intrastate commerce, depends upon the nature and reach of the *agreement* itself. Whether the *oil* then "at rest" and sought to be *protected* by such agreement from the competition of the Evansville Oil Company, had been imported

from Pennsylvania or had been pumped from wells in Tennessee, is a matter of *no significance* in arriving at the nature, meaning and terms of the criminal *agreement* itself. But whether the oil *excluded* by the conspiracy agreement, was *to come* from Pennsylvania, or from Tennessee is all-important.

If oil-dealers in Tennessee, who are stocked with oil that was found and refined *in Tennessee*; or oil-dealers in Tennessee, who are stocked with oil *at rest* in the State, which had been imported from Ohio; or if oil dealers in Tennessee, who have no oil on hand at all, but expect to purchase and carry it in stock, combine and conspire to break down the *competition of Indiana importers*, they are guilty of a criminal combination in each and every of the three cases alike. The reason is that the *situs* of the *oil* they are minded to "protect" at the moment the agreement is made, is *immaterial*, since it is a fact which is but an accident of the case. But the fact that the *competition* to be broken down by the agreement, is *Indiana competition* is the controlling and important fact in the case. To say that it is Indiana competition is to say that it is interstate commerce. Whether the conspirators have their oil "at rest" in Tennessee, or not, must be wholly immaterial.

If Salesman Rosemon had been representing an oil dealer located and doing business at *Knoxville, Tennessee*, and the orders which he took from the Gallatin merchants had been for oil to be shipped from Knoxville, his sales to

the Gallatin merchants, or transactions with them, *would* have been *intra-state* commerce, and the Holt agreement, if a conspiracy at all, *would* have been an offense against the State Anti-Trust Act. But inasmuch as Mr. Rosemon was representing an Indiana concern, and his sales contemplated and included *transportation* by that concern, from another State to Tennessee, *his* transaction with the Gallatin merchants was *inter-state* commerce, and the Holt agreement which *hit* that transaction, if a conspiracy at all, necessarily was an offense against interstate commerce, against the Federal Statute, the Sherman Act, and *not* against the statute of Tennessee.

The following cases illustrate the rule:

In *Hadley-Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. Rep., 243 (74 C. C. A., 462), it appears that the Hadley-Dean Company of St. Louis, Mo., gave an *order* to the Highland Glass Company of *Pennsylvania*, for the manufacture, and *delivery at St. Louis*, of a large quantity of window glass. Some of the glass was shipped and delivered, accepted, and paid for; but the purchaser refused to take the remainder. Thereupon, the seller, the Highland Glass Company, sued for a breach of the contract.

One defense was that the plaintiff was a member of a combination that was unlawful under the Anti-Trust Act of *Missouri*, and that by the terms of *that* statute it could not recover. But it was held that the Missouri statute

could have no application to this contract, without infringing upon the exclusive authority of Congress to regulate commerce among the States, and that the plaintiff could recover. In other words, the holding was that the State Anti-Trust Statute would be void as a regulation of interstate commerce, if extended and *applied* to transactions of the character involved in that case.

A statute of New York provided that all goods made by convict labor, offered for sale in that State, should be labeled "Convict Made." The statute did not *prohibit* the sale of convict-made goods, neither did it assume to prohibit their importation. It only required that they should be labeled so as to show that they were made by convict labor.

One Hawkins imported a lot of scrub-brushes from Ohio, which had been made by convict labor, and sold them, *without* the required label. Criminal prosecution under the statute failed, because the statute was held to be void as a regulation of interstate commerce. It related to the *sale* of imported articles—that is, to interstate commerce itself.¹

A statute of South Carolina provided that any vehicle or boat (except *regular* steamers, and railways) transporting intoxicating liquors *into* South Carolina *at night*, should be liable to seizure and confiscation. "The Carolina" (not being a "regular" steamer) sailed from Savannah, Georgia, to Charleston, South Carolina, with liquors

¹*People v. Hawkins*, 157 N. Y., 1.

on board. This schooner arrived at Charleston and tied up at the dock, *at night*. She was seized by the chief constable and libeled. The court held the statute to be void as a regulation of interstate commerce.²

In *Greek-American Co. v. Richardson*, 124 Wis., 469; 109 Amer. State Rep., 961, it appeared that the Richardson Drug Company, an Illinois corporation, doing business at *Chicago*, sold a bale of sponges to the Greek-American Co., of *Milwaukee, Wisconsin*, to be shipped from Chicago to Milwaukee, under a contract (made in Chicago) to the effect that when the sponges were delivered to the purchaser at Milwaukee, they might be rejected, if not satisfactory.

The sponges were shipped and accepted. The seller brought suit to recover the price.

The defense was that the seller was a foreign corporation which had not complied with the laws of Wisconsin, prescribing the terms on which foreign corporations could do business in Wisconsin, and which laws forbade recovery on contracts made without having first complied with the statute.

The Court held that the transaction was one of interstate commerce, and that the State statute was invalid as a regulation of interstate commerce if applied to such contracts. The seller was given his judgment.

²*Jerver v. "The Carolina,"* 66 Fed. Rep., 1013.

This case is valuable as an illustration of the rule that when a transaction is interstate commerce, State statutes "regulating" it—that is, prescribing the rights and duties of the parties with respect to it—are inapplicable or void.

The case of *Rearick v. Pennsylvania*, 203 U. S., 507, heretofore mentioned on page 54 hereof, is also in point.

The latest treatise upon the police power is by Professor Freund. After discussing the Federal Anti-Trust Laws, he says that a State—

"cannot prevent an industrial *trust* organized in another State from coming into its territory for the purpose of selling its products to be sent from the State where they are manufactured. (Of course he means a trust of natural persons.)

"*Probably* a State cannot even prevent its own citizens from combining in its own territory to restrain competition in the importation of goods from outside of the State, although prohibitions to that effect are found in the anti-trust laws of several States." (Referring to Arkansas, Minnesota, Montana, Tennessee and Utah.)³

However, it is not necessary to insist upon that proposition in the present case.

It will be no answer to suggest that the conspiracy violated *both* the State and the Federal statutes. *They* cover

³*Freund's Police Power*, Sec. 342.

different fields. The statutes of both Governments, it is true, relate to contracts and agreements in restraint of "commerce," but one relates to interstate commerce, and the other to intra-state commerce. A criminal conspiracy may, more or less, affect both commerces, but it can violate the statute of only one jurisdiction in a justiciable sense.⁴

The Supreme Court of Tennessee in the present case recognized this, and accordingly held that the alleged conspiracy related to *interstate commerce indirectly*, merely. That Court said:

"The Legislature was cognizant, we must presume, that it had *no power* to enact laws regulating *interstate commerce*, and did not *intend* to enact an unconstitutional law, in whole or in part. There was already then in force an act of Congress, the Sherman Anti-Trust Act, enacted in 1890, *fully covering that subject*, the provisions of which were broader and more effective than those of this act, and could be enforced to their fullest extent by the stronger and more vigorous government. There was neither the power nor the necessity for enacting any legislation relative to interstate commerce. The wrongs to trade which were intended to be corrected and punished, were those being perpetrated against commerce *within* the State, which *Congress could not reach*, and for which there was then no efficient remedy."⁵

⁴*Prentice & Egan*, Commerce Clause, Fed. Const., p. 336; *Prigg v. Penna.*, 16 Pet., 539, 617; *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211, 229, 230.

⁵Opinion, Record, pp. 524, 525.

It is to be constantly borne in mind that the question in this case is *not* whether this Tennessee *statute* is invalid because it regulates interstate commerce, but it is this: Is the criminal *agreement* a violation of the Federal statute, *or* of the State statute? There is a Federal statute which makes criminal all combinations in restraint of interstate trade, and there is a State statute which makes criminal all combinations in restraint of intra-state trade. It is not a question whether the State *statute* infringes on the Federal *statute*. The question is whether an *agreement* which this Court denounced in Holt's case and in this case as criminal, is an offense against the one statute *or* the other.

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Undeniably this agreement, in a sense, *remotely* "affects" all commerce or trade, and therefore in a *latitudinarian* sense may be said to affect both kinds of commerce. This may be said of all agreements between merchants affecting the sale of merchandise. But while this is true, in a latitudinarian sense, it is *not* true in the *legal* sense. In *law*, in order to the administration of justice and to the *delimitation* as far as possible of the jurisdictional boundaries of the State and Federal Governments, *commerce*, in all cases, will be adjudged to be either intra-state or interstate commerce—one *or* the other, but *not both*. And so it must be that every criminal conspiracy against trade and commerce, is to be adjudged an offense against either interstate *or* intra-state commerce, one or the other, but not an offense against both.

To do this the courts have distinguished between "direct," or "indirect and remote" effects. An examination of the cases reveals that the courts have probably adopted this nomenclature for lack of better terms. There is no exact line of demarkation between interstate commerce and intra-state commerce. It is for that reason the State Court said that a combination which affects interstate commerce is *none the less* an offense against Federal law, "and punishable under *it*," because it also "incidentally" affects intra-state commerce.

The contract that is condemned by the Federal statute is "one whose *direct and immediate effect is a restraint* upon that kind of trade or commerce which is interstate."

There must be some *direct and immediate* effect upon interstate commerce to come within the act. ⁶ "There must be, so to speak, a *privity* between the *manifestation* of the power, and the *resulting* burden."⁷

This last was said with reference to a State *statute*, but the principle is the same as to *agreements*.

In *Cincinnati Packet Co. v. Bay*, 200 U. S., 179, the question was whether a certain agreement violated the Federal law. The Court said that it did not; and for the reason that "the *chief and visible* object of its *provisions* has nothing to do with interstate commerce."⁸

⁶*Hopkins v. United States*, 171 U. S., 592.

⁷*Northern Security Co. v. United States*, 193 U. S., 394; White, J., dissenting.

⁸200 U. S., 184.

Speaking of a *tax* in a tax case, this Court said that neither the State Court, nor the State Legislature by giving the tax a particular *name*, or by the use of some *form* of words, can take away the Court's duty to consider the *nature and effect* of the tax. "If it bears upon commerce among the States so directly as to amount to a regulation in a *relatively immediate* way, it will not be saved by name or form."⁹

Tried by this rule, the Holt-Love-Cron agreement (if criminal) is an offense against *Federal* law, because the *Rosemon-Love-Cron* contracts which it *hit* and was *meant* to destroy, and which it did destroy, undeniably were purely of an interstate commerce character. The *competition* with oil *about to be imported*, and against which it sought to "protect" the Standard Oil Company's oil, then "at rest," was of an interstate character. The State Court admitted that an agreement which *directly* affects interstate commerce, is none the less an offense against Federal law, and punishable *thereunder*, because it "indirectly" affects intra-state commerce also.

Suppose that the importation of oil by the Evansville Oil Company *was* "the occasion, the incentive of the conspiracy,"² surely it is inexact to say that *this* fact must make the *agreement* one which "*directly* affects *intra*-state commerce! An agreement whose purpose and effect is to

⁹*Galveston, etc., Ry. v. Texas*, 210 U. S., 217, 227.

¹117 Tenn., 647.

²117 Tenn., 647.

prevent the *importation* of oil from another State (which is in itself interstate commerce) is *necessarily* leveled at, and relates to, interstate commerce, instead of intra-state commerce. Finally, it is to be said that the agreement itself *in terms* related alone to interstate commerce: That was its "chief and visible object."

The Attorney General in his brief maintains that the meaning *and application* of a State statute is to be determined by the decision of the State Court.³ For this he cites *Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28, 42; *Leeper v. Texas*, 139 U. S., 462, 467; *Smiley v. Kansas*, 196 U. S., 447, 455. But these cases neither announce nor sustain such doctrine. Many cases are to be found which hold that the *interpretation* placed upon a State statute by its highest court will be accepted by this court as correct, but they have not conceded that the *application* which a State Court makes to the facts is binding on this Court. The rule is otherwise, as already shown. If the *judgment* in the case denies a Federal right, this Court will correct it.⁴

The mere *construction* of a State statute does not of itself present a Federal question.⁵ But when a statute, as construed by a State Court, is *applied* by that Court to a transaction, or offense, really *within* the operation of Fed-

³Brief (on the motion to dismiss or affirm) p. 31.

⁴*C., B. & Q. Railway v. Drainage Commr's*, 200 U. S., 580.

⁵*Knop v. Monongahela, etc., Co.*, 211 U. S., 485.

eral laws, a Federal question is presented; and for the reason that there is then a question as to the *relation* between the Federal Constitution or statute which *rightfully* applies to and controls the act, or transaction, or offense, and the State statute which the State Court *by its judgment*, applies to that transaction or offense.⁶

To meet this the Attorney General was constrained to *claim* that the transactions complained of are *intra-state* transactions.⁷ But they are *not*, as we think we have shown.

We concede that the Tennessee statute, as construed by the Supreme Court of the State in Holt's case, applies and relates to conspiracies against intra-state commerce alone, and that this Court is bound by that construction. The question here is not one of the *construction* of that statute, but of its *application*.

By the decree now complained of, the Supreme Court of Tennessee has seized upon an *interstate* commerce transaction, and adjudged it to be an *intra-state* one, *so as to bring it within the operation of the State statute*. The Appellant's rights were invaded, not by the mere *interpretation* placed upon the Tennessee statute, but by the *appli-*

⁶*Knop v. Monongahela Coal Co.*, 211 U. S., 488;
Ex parte *Young*, 209 U. S., 144.

⁷Brief (on the motion to dismiss or affirm) pp. 42, 43.

cation which the State, through its Judicial Department, has made of that statute to an *inter-state* transaction.⁸

The Fourteenth Amendment relates to *all* State actions—legislative, *judicial* and executive.⁹ It means that no agency of a State, executive, legislative, or judicial, can deny due process of law, or the equal protection of the laws.¹

It is mere verbal jugglery to say that a State *statute* has no application whatever to interstate commerce, and at the same time hold that a pure interstate commerce *transaction* is an intra-state one, so as to bring it within that statute. The decree interpreting a statute and applying it must be considered as a whole.² It is not merely a question here of the State Court's *interpretation* of a statute. It is the question of the *application* of that statute to interstate commerce, and the determination and decision of a *case*. This Court announced in *General Oil Company v. Crain*, 209 U. S., 228, that a party is entitled "to be protected against a State law which violates a constitutional right, whether such violation be wrought by the terms of the state, or *in the manner of its enforcement*." In both cases

⁸*Adams Ex. Co. v. Ky.*, 214 U. S., 221.

⁹207 U. S., 36.

¹*Ex parte Virginia*, 100 U. S., 339; Guthrie, Fourteenth Amendment, 2; McGhee, due process of Law, 27.

²*Lowe v. Lawler*, 208 U. S., 299.

alike such decision gives effect to the statute, and it is therefore reviewable by this Court.³

An act of the Legislature may be unconstitutional and void. A legal wrong is done to a man who is accused and convicted under such an act.

An act of the Legislature may be constitutional and valid, and still a legal wrong may be done to a man who is accused and convicted under it. For example, a man may in point of fact be put on trial and convicted a second time under a valid or constitutional act for the same offense. The legal wrong and injury is the same in both cases.

The wrong is the same whether an accused person be convicted and punished under an unconstitutional statute, or he be convicted and punished in *violation* of the Constitution, under a *valid* statute. The Court really has no jurisdiction in either case.⁴

When no Federal question is involved in a case, the fact that the *State Court holds* that one is, and considers and decides it, will not oblige this Court to take jurisdiction of the case. It will refuse to do so, notwithstanding the State Court's decision.⁵

So where the State Court decided that a certain contract *was not* a maritime contract, and therefore that the remedy

³209 U. S., 228.

⁴Hans Neilson, Petitioner, 131 U. S., 183.

⁵*Elder v. Colorado*, 204, U. S., 585.

given by a lien law of the State, did not conflict with the Constitution of the United States, *this* Court held that it was for *it* to determine ultimately whether the contract was a maritime one or not, and whether there was any conflict.⁶

This Court will not permit its jurisdiction to be cut off from the determination of a Federal question in a case where that question has been *attempted to be avoided* by the State Court, or has actually *been avoided* by an *unreasonable construction* of a contract, or of pleadings.⁷

“Neither the State Court nor the Legislature, by giving the tax a particular *name*, or by the use of some *form* of words can take away our duty to consider its nature and effect”—that is, the nature and effect of the “tax” imposed. If it bears upon commerce among the States so directly, as to *amount* to a regulation in a *relatively immediate way*, it will not be saved by name or *form*.

A State Court may be capricious and unreasonable in the *interpretation* of the State statutes, and preclude this Court from considering and determining Federal questions, so far as that can be accomplished by placing an *interpretation* upon State statutes. But that is the limit. This Court is not concluded by the rulings of the State Court with respect to Federal questions beyond that of the *interpretation* to be placed upon the State statute involved.

⁶*Edwards v. Elliott*, 21 Wall., 550.

⁷*Vandalia R. R. v. South Bend*, 207 U. S., 367.

⁸*Galveston etc., Ry. v. Texas*, 210 U. S., 217, 227.

It will always determine for itself whether any Federal question is involved which will entitle it to review the judgment of the State Court.⁹

Where the State Court so construes a State statute as to impose a "tax" within the meaning of the Federal Bankruptcy Act, this Court held that such ruling did not make it so in fact; and the Court considered the question *de novo*, for the reason that, although the question involved the construction of a State statute, yet it also involved, *in its application*, a Federal statute.¹

Of course when the assertion of a Federal question is *frivolous* and without *color* of merit, this Court will not exercise jurisdiction.² But when it is not frivolous the jurisdiction exists. The question of jurisdiction was settled when the motion made at the last term to dismiss or affirm was overruled. Jurisdiction does not depend upon the fact that the Federal question shall be ultimately decided in favor of the Appellant, or that it shall even be decided at all.³

The Federal questions in this case were made in the pleadings, and in the assignment of errors, and in the peti-

⁹*Vandalia R. R. v. South Bend*, 207 U. S., 367; *Sullivan v. Texas*, 207 U. S., 423.

¹*New Jersey v. Anderson*, 203 U. S., 491.

²*Otis v. Ludlow*, 201 U. S., 140, 150; *Sullivan v. Texas*, 207, 422.

³*Siler v. L. & N. R. R. Co.*, 213 U. S., 191.

tion for rehearing, and in the brief. It was not possible for the Supreme Court of Tennessee to decide as it did decide, without overruling or ignoring them.⁴

Consequently the rule is that when there is a Federal question adequate for the exercise of jurisdiction by this Court (of which *it* is always to be the judge) the Court acquires jurisdiction, not merely of the decision of the Federal *question*, but over the *whole* case, and it will open up and review the *whole* case when it is a case *in equity*, and *not* one which has been tried by a jury in a court of law.⁵

This brings us to the second Federal question in the case.

⁴*Otis v. Ludlow*, 201 U. S., 140, 150; *Sullivan v. Texas*, 207 U. S., 422.

⁵*Burton v. United States*, 196 U. S., 295; *Horner v. United States*, 143 U. S., 570; *Holder v. Aultman*, 106 U. S., 89; *Williamson v. United States*, 207 U. S., 425; *New Jersey v. Anderson*, 203 U. S., 423; *Siler v. L. & N. R. R. Co.*, 213 U. S., 191.

SECOND PROPOSITION.

THE ANTI-TRUST ACT OF TENNESSEE UPON WHICH THE PRESENT PROCEEDING IS BASED, IS VOID BECAUSE IT DENIES TO THE DEFENDANT, THE STANDARD OIL COMPANY, THE EQUAL PROTECTION OF THE LAWS AND DEPRIVES IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The Anti-Trust Act of Tennessee, Chapter 140, Acts 1903, upon which the present proceeding is based, is not a statute prescribing the conditions on which foreign corporations may enter, and do business in, Tennessee. It is a general criminal law that relates to persons and corporations alike.

The only distinction it makes between them is in the punishment prescribed for its violation (117, Tenn., 664). It does not provide for proceedings against corporations for distinctive corporate wrongs—for some sin against the laws of their corporate being. Neither does it provide for proceedings against foreign corporations for failing to comply with the prescribing conditions on which such corporations are admitted to the State and permitted to do business.

As a general criminal law it forbids conspiracies against trade, and provides for the punishment of all persons, domestic corporations and foreign corporations, that violate its terms.

We are frequently able to more clearly understand what a case is, through a clear perception of what it is not. The present case really is not a proceeding against a corporation, *as a corporation*, but as a *criminal*. It is *not* a proceeding to reach a corporation because it has committed some offense which *only* corporations can commit. Upon the contrary, it is a proceeding to *punish* a corporation for the violation of a *general criminal law*—the violation of a law which is *leveled* at natural and artificial persons *alike*, and to punish for an offense which persons and corporations can commit equally and alike. The only difference in the eye of this general law, between persons and corporations is “in the *punishment* provided.”⁶

The present case is *not* a proceeding against a foreign corporation for failing to comply with the laws of Tennessee prescribing the *conditions* on which foreign corporations are admitted to the State, and permitted to do business. It is not even contended that it is. The bill expressly avers, and thereby concedes, that the Defendant Company filed a copy of its charter with the Secretary of State on the 21st day of September, 1893, and ever since that time has been claiming the right to do, and has been doing, business in Tennessee.⁷

The bill also avers and charges that the Defendant has “violated” the provisions of Section 1 of Chapter 140 of

⁶117 Tenn., 664.

⁷Record, p. 1.

the Acts of Tennessee of 1903, and that it (the bill) “*is brought by the Complainant through her Attorney General, as aforesaid, in order that the PUNISHMENT of such violation prescribed by Section 2 of said Act may be imposed upon said Defendant Company.*”⁸

On the hearing before the Supreme Court of Tennessee, the Attorney General for the State endeavored to destroy the complexion which the case *has* by reason of the setting which was given to it by him in the *pleadings*, and to give the case an altogether different hue. To that end, in the brief filed in that Court (and which is in the record), he *in substance*, said that:

Foreign corporations do business in Tennessee by comity, not by right, and they can be excluded absolutely in the first instance, or permission once given can be withdrawn at the pleasure of the State. The revocation of such permission, is not the infliction of a penalty, nor is it punishment, in a legal sense.⁹

“The punishment inflicted by the statute should be denominated ‘*a statute liability*,’ and this suit should be *regarded* as having been instituted for the purpose of making a ‘judicial record’ of the fact that for violating the provisions of the act the Defendant ‘is denied’ the right to do business in the State, and also for the purpose of *enforcing* such ‘denial’ by the injunctive process of the Court.”²

⁸Record, p. 4.

⁹Record, p. 491.

¹Record, pp. 488, 489.

²Record, p. 491.

That argument of the Attorney General seems to have proceeded upon the assumption that dainty terms can change the substance of things; that to *call* a judgment pronouncing the Defendant guilty of the violation of a general criminal statute, and imposing the punishment prescribed by that statute, and which is based upon pleadings which aver that the bill was brought to inflict the punishment imposed by the statute—to *call* that judgment a mere “judicial record” of the fact that a “denial” of the right to do business had been made, a “statute liability,” for the reason that the Defendant had been guilty of violating the provisions of the act, actually *operates* to convert the bill into a mere “*revocation*” of the license previously granted to do business in Tennessee.

But the Supreme Court of Tennessee said:

“We have assumed that foreign corporations doing business in the State are entitled to the same status and rights as domestic corporations; and in truth, they *are* so entitled under the Act in question, Chapter 140, Acts 1903, in respect of proceedings to stop them from doing business here, and it seems from the authorities cited, that they have been treated with the same consideration in other States.” (*Record*, p. 523.)

True, the Court adds:

“It is well to remember and to remark that they (*foreign corporations*) have no contract rights with the State; they are here merely on sufferance, guests,

as it were, of the State, and have no right to complain of the procedure which the State has adopted to try the question whether they have *abused the courtesy* shown them, and have thereby forfeited a continuance of it. That the power exists in the State to otherwise deal with them is shown and illustrated in *Insurance Company v. Craig*, 106 Tenn., 621, 641, wherein the Court sanctioned the provision in the Insurance Laws of the State giving power to the Insurance Commissioner, *without* proceedings in the ordinary courts, to exclude foreign insurance companies for certain violations of law after they had obtained a license to do business here." (*Record*, p. 523.)

As will be seen, the opinion of the State Court rests the case, *in substance*, upon the following reasoning, namely:

Quo warranto, and its substitute (bill in equity upon relation) are *civil* proceedings. They have always been used to correct *corporate* abuses. They are also now employed to oust foreign corporations, as well as to dissolve domestic ones. For that reason, when the statute (as this statute does), imposes expulsion or ouster, and dissolution, as the *punishment* for its violation on the part of *corporations*, it has the right to provide that the *procedure* which has always been employed to correct *corporate* abuses, may be used to *punish* corporations for violations of *this* statute. As that procedure is a *civil* proceeding, and *not* a criminal proceeding, the *defensive rights* which persons and corporations enjoy, when proceeded against *criminally*, do *not* exist here. Foreign corporations have the same status, and rights, that do

mestic corporations have, under this Act, but *neither* of them have the *defensive rights* that persons have, inasmuch as *they* can be proceeded against in *civil* proceedings where no such rights exist, while *persons* must be proceeded against by *criminal* procedure where all such defensive rights *are* enjoyed.

However, it "is well to remember, and to remark" that foreign corporations are mere "guests" of the State, doing business by *courtesy*, and therefore can have no *right* to complain of the procedure which the State adopts (*whatever it may be*) to try the question whether they have abused that courtesy and thereby forfeited a continuance of it. For this last reason we *could* have affirmed the decree of the Court below; but we have seen proper to place our decree of affirmance upon the ground *first* stated, namely, that the proceeding described is a *civil* proceeding, and being a *civil* proceeding, the *defensive rights* contended for *cannot* be enjoyed.

State v. Craig, 106 Tenn., 621, cited by the State Court, was a case involving legislation relating to foreign *insurance* companies. It was held that the Insurance Laws of Tennessee conferred upon the Insurance Commissioner of the State, *exclusive and final* authority to grant or refuse permission for an *insurance* company to do business in Tennessee, in the first instance, to withdraw that permission after it had been granted, and to revoke certificates of authority after issuance.³

³106 Tenn., 634.

Undeniably, *if* it be true that the laws, under which foreign *insurance* companies are permitted to enter Tennessee, and do business therein, confer *exclusive* and absolute authority upon a Commissioner to say whether the companies may enter the State or not, and, to say whether and when they, being in, shall depart—*if* such be the conditions of admission, insurance companies can have no relief in the courts from his judgment. If the statute provided, as the Court in *that* case said it did, that the insurance company could not do a certain thing, and that the Insurance Commissioner of Tennessee should be the exclusive and final judge of the question of guilt that is, of whether it had done that thing or not; and *if* it provided that it was a *condition* of admission that *his* judgment should be *final* and conclusive, undeniably the company was without redress. In such case the company would not only be a “guest, as it were” of the State, at the pleasure of the State, but at the pleasure of the State’s butler, at that.

It cannot be successfully contended (we submit) that foreign trading corporations have such a status in Tennessee as that. It cannot be successfully contended with respect to *trading* corporations, that it *was* a *condition* of their admission to Tennessee that a *civil* procedure in which all “defensive” rights are denied should be the procedure used to *punish* such corporations for the violation of the State’s general *criminal* laws. The most that can fairly be maintained in that respect is, that inasmuch as it

is provided in this Anti-Trust Act that a *civil* proceeding shall be used to punish corporations for violating the provisions of that act, and inasmuch as the offense is a violation of, and disregard for, a law, the statute *ought* to be *construed* to be one *prescribing conditions of admission*, rather than be construed to be one for *punishing* the violation of a *general law*, even though such law was enacted ten years after the corporation had been admitted.

If it be conceded, for argument, that it is within the power of the Legislature to enact that all foreign corporations, *already* lawfully doing business in the State, shall be regarded as mere guests of the State, and that strict observance of all *general criminal* laws shall be a *condition* of the right to remain, and that the question of such observance shall be determined, *exclusively* and finally, by some *civil* proceeding, in which the usual *defensive rights* shall be *denied*, it must surely be acknowledged that *before* a statute, which it is *claimed* does this, *should* be construed to do it, its meaning should be explicit and clear. Before a *subsequently* enacted statute, which is a *general criminal law*, applicable to persons *and* corporations alike, should be *construed* to mean that foreign corporations already lawfully doing business in the State, may be declared to have forfeited that right, *without* the right of a *full and fair trial*, and thereby be denied the equal protection of the laws, that construction should certainly be plain and clear beyond any sort of a doubt.

We believe, and therefore may concede, that a State may, according to its own pleasure, proceed in either of one or two ways: (1) it may make a conspiracy against trade, an offense by a general criminal law, and it may punish that offense, and such punishment may be a fine or forfeiture, dissolution (or ouster), or both; (2) *Or*, it may make it a *condition* of admission, that a foreign corporation shall, by coming into the State, thereby agree not to engage in a conspiracy against trade, denounced by a general criminal law, and be ousted from the State, by a *civil* proceeding, if it does, in which the usual *defensive rights* shall *not* be enjoyed.

Obviously, it is one thing to exclude foreign corporations unless they conform to certain prescribed *conditions* of admission, and quite another thing to subject them, after they have complied with the conditions, to general statutory laws. While it may be allowable for the State to proceed either way, yet, we repeat, that if a general criminal law is meant to prescribe *conditions* of admission, rather than *punishment* for violation of its provisions, it should clearly and unmistakably appear. If the policy of the State does not permit the business of a foreign corporation within its limits, it ought to be expressed in some affirmative and unmistakable way.

In *Carroll v. Greenwich Ins. Co.*, 199 U. S., 409, this Court said:

"We assume for purposes of decision, that the bill means that the auditor threatens and intends to enforce the act in case the Plaintiffs do what they desire to do, and that if section 1754 is contrary to the Constitution of the United States, a proper case for an injunction is made out. We assume, further, that the position of the Plaintiffs is not affected by the fact that they are foreign corporations. The act is in general terms and hits all insurance companies. If it is invalid as to some, it is invalid as to all. That the requirements of the act *might* have been made *conditions* to foreign corporations doing business in the State is immaterial, since as we understand the statute, the Legislature did *not* attempt to reach the result in that way. *A company lawfully doing business in the State is no more bound by a general unconstitutional enactment, than a citizen of the State.*"

In *Fidelity Mutual Life Assurance Ass'n. v. Mettier*, 185 U. S., 332, Justices Harlan and Brown, dissenting, said:

"It is *one* thing for a State to forbid a particular foreign corporation, or a particular class of foreign corporations from doing business at all within its limits. It is quite *another* thing for a State to admit or license foreign corporations to do business within its limits and *then* subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation doing business in Texas under its license, or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States, and cannot

therefore be enforced against it, the State need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a *condition* of the right of the corporation to do business in the State, and whether constitutional or not, must be respected by the corporation. *Corporations* created by the several States *are necessary to the conduct of the business of the country*; and it is a startling proposition that the State may permit a corporation to do business within its limits, and by *that* act acquire the right to subject the corporation to regulations that may be *inconsistent* with the supreme law of the land.”³

In *W. W. Cargill v. Minnesota*, 180 U. S., 468, the Court said:

“The Defendant, however, insists that some of the provisions of the statute are in violation of the Constitution of the United States, and *if* it obtained the required license, it would be held *to have accepted* all of its provisions, and (in the words of the statute) ‘thereby to have *agreed* to comply with the same.’ The answer to this suggestion is, that the acceptance of the license in whatever form, will not impose upon the licensee an obligation to respect or comply with any provisions of the statute, or with any regulations prescribed by the State Railroad and Warehouse Commission that are *repugnant to the Constitution* of the

³I do not think the majority opinion rejects the distinction insisted on in the dissenting opinion, and cite it only for a clear statement of the distinction.

United States. A license will give the Defendants full authority to carry on its business in accordance with the *valid* laws of the State, and the *valid* rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke the one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations *inconsistent* with the Constitution of the United States, the rights of the applicant, or the licensee *could* be protected and enforced by appropriate judicial proceedings.”

In *American Smelting & Refining Co. v. Colorado*, 204 U. S., 103, it appears that the laws of Colorado provided that foreign corporations should file with the Secretary of State a copy of the charter and pay a certain tax, and thereupon obtain a certificate, before they could do business in that State.

They further provided that upon so doing, the corporation should be subjected to all the liabilities, restrictions and duties which “are, or may be,” imposed upon *domestic* corporations.

The Smelting Company complied with *the* laws, paid the tax, received a certificate, established itself, and began to do business.

Thereafter, and while the corporation was doing business in Colorado, a *new* law was passed imposing a certain annual tax on *domestic* corporations, and an annual tax of

twice that amount on *foreign* corporations "*as a condition precedent*" to the right to do business.

The Smelting Company denied liability for this tax. Thereupon the Attorney-General of the State instituted proceedings in the nature of *quo warranto* to oust it.

The State Court held that the Company was liable, and decreed accordingly; but this Court held that by complying with the original statute, a *contract* was entered into which could not be impaired by subsequent legislation. The contract thus entered into was this: that the Smelting Company had the right, so long as it obeyed the *general* laws, to do business in the State for twenty years (the life of domestic corporations), without being subject to other or different taxes than those imposed at any given time upon domestic corporations.

It will be observed that the later law *expressly* provided that the corporation should be subject to all the restrictions and duties that "are, or may be," imposed upon domestic corporations, *as a condition precedent* to the right to do business.

The Supreme Court of Tennessee *really* has not attempted to depart from the construction it placed on this Act in *Standard Oil Co. v. State*, 117 Tenn., 664, wherein it said that—

"Corporations are *forbidden* by the statute from making the agreements prohibited, and punishment

imposed upon them and their officers and agents acting for them in effecting and carrying it into execution when found guilty. The *only distinction* made in the statute between natural persons and corporations violating its provisions, is in the *punishment* provided. The Legislature had the power to enact that *corporations* could commit and *be guilty* of this offense, and has done so."

The present bill is based on that case. It was not brought for any sin against the law of *corporate being*. It was not brought to assert a civil right, but to inflict the *punishment* imposed by a general criminal law. After charging that the Appellant "violated" the statute, the bill avers that—

"This bill is brought by the Complainant through her Attorney-General as aforesaid, in order that the *punishment* of such violation prescribed by section 2 of said Act, may be *imposed* upon said Defendant Company, to wit: That said Defendant Company be denied the right to do and be prohibited from doing business in this State."

Record, p. 4.

The Attorney-General sought on the trial in the State Court to have another construction of the Act. But no amount of *phrasing* could alter the fact that it is *punishment* which is inflicted, and that the bill was filed to have the punishment prescribed by that general law inflicted upon the Defendant, *as a criminal*.

The Court admitted in the present case that ouster is inflicted by the Act, as a *punishment* upon offending corporations, for it said:

“Now was it competent for the Legislature to provide a civil remedy against corporations, and a criminal remedy against natural persons? Is there any good reason for the discrimination? It seems that there is a good reason in the fact that it is impossible to *punish* corporations by imprisonment, which can be inflicted only on natural persons. . . . The *punishment* inflicted upon the corporation is one peculiar to corporations, and is inflicted in the same *manner* in which this form of *correction* has been applied to corporations ever since there has been any public redress at all in this State for *corporate* wrongs, and is the same in substance which has been applied by English-speaking people for a time which the memory of man runneth not to the contrary.”⁴ .

Courts look at the *substance* of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority.⁵

In dealing with constitutional provisions affecting personal and property rights, this Court construes them broadly, and not in a technical way. To illustrate: In *Ex parte Garland*, 4 Wallace, 333, it appeared that Mr. Garland, of Arkansas, had been admitted to practice in

⁴Trans., p. 522.

⁵*Mugler v. Kansas*, 123 U. S., 661.

the Supreme Court of the United States in 1860, and, of course, had then taken an oath to support the Constitution of the United States. During the Civil War he entered the Confederate service. In 1865 Congress passed an Act to the effect that no person should be allowed to practice in the Federal Courts without making oath that he had not voluntarily borne arms against the United States. Mr. Garland, of course, could not take that oath. The President *pardoned* Mr. Garland for all offenses as a rebel. He presented his pardon, and asked to be permitted to practice in the Supreme Court without taking the oath, in 1865. The application was resisted on the ground that while the pardon protected him from punishment for what he had done as a *rebel* during the war, the oath was another matter—that *it* regulated and prescribed the *qualification* of members of the *bar*, and therefore was not covered by the pardon. But this Court held that the pardon operated to relieve him from taking the new oath. Mr. Justice Fields said:

“As the oath prescribed cannot be taken by these parties, the Act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions, or any of the ordinary vocations of life for past conduct can be regarded in no other light than as *punishment* for such conduct.”

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“And exclusion from any of the professions, or any of the ordinary *avocations of life* for past conduct,

can be regarded in no other light than as *punishment* for such conduct.”

4 Wall., 377.

The statute under consideration in *Ex parte Garland* (4 Wall., 820), requiring an oath, which those who had taken part in the war between the States could not take, was sought to be sustained upon the ground that it was merely prescribing a *qualification* for attorneys-at-law—merely prescribing the oath which those wishing to appear as practitioners could take, and that it could be sustained on this ground. But the Court said that the question was not as to the *power* of Congress to prescribe the qualifications of attorneys, but *whether* that power had been *exercised as a means for the infliction of punishment*. It held that it was exercised as a means for the infliction of *punishment*, and was prohibited by the Constitution.

In *Cummings v. Missouri*, 4 Wall., 320, the Court also said:

“We do not agree with the counsel of Missouri that ‘to *punish* one, is to deprive him of life, liberty, or property, and that to take from him anything *less* than these, is *not* punishment at all.’ The *deprivation of any rights, civil or political*, previously enjoyed may be *punishment*, the circumstances attending and the causes of the deprivation determining the fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. *Disqualification from pursuits of a lawful avocation*, or from posi-

tions of trust, or from the privilege of appearing in the Courts, or acting as executor, administrator, or guardian, may also, and often has been, imposed as *punishment*."

Mr. Jefferson Davis was indicted at Richmond, Va., for treason during the Civil War. While the indictment was pending, the Fourteenth Amendment to the Constitution was adopted. Among other things, it provides that no one who had previously taken an oath to support the Constitution of the United States as a Senator or member of Congress, and thereafter engaged in the rebellion, should be eligible to be a Senator or Representative in Congress, or to hold any office. Mr. Davis had been a Senator before the war. Mr. Davis' counsel moved to quash the indictment on the ground that when the Fourteenth Amendment prescribed this *particular* disqualification, it in effect relieved from *all other* penalties and disqualifications; that by inflicting this particular punishment for having engaged in the rebellion, by *implication*, all other forms of punishment were forbidden. The question was argued by such lawyers as Mr. O'Connor and Mr. Everts. Chief Justice Chase, who sat in the case, and District Judge Underwood divided in opinion, and so the question was certified to the Supreme Court. *But the Chief Justice was of the opinion that the motion was well taken and that the indictment should be quashed.*⁶

⁶4 Fed. Cases No. 3621a.

In *Coffey v. Harlan County*, 204 U. S., 659, it appears that a statute of Nebraska provided that any public officer guilty of embezzlement of public money should be imprisoned in the penitentiary, and pay a fine equal to double the amount he had embezzled, the fine to operate as a judgment, for which execution should issue, for the use of the persons whose money had been embezzled. It appears further that one Whitney was treasurer of Harlan County, Nebraska, and that he embezzled \$11,190. He was found guilty, sentenced to imprisonment, and to "pay a fine in the sum of \$22,380—double the amount of the embezzlement." The Court held that it was immaterial whether he had made *restitution* in whole or in part, and that it was not important what the *penalty* was *called*, inasmuch as it came to him *as the result of his crime.*⁷

In the course of the opinion in that case, Mr. Justice Moody said:

"As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of a convict. It is not of the slightest importance whether this fine is *called* a penalty, a punishment, or a civil judgment. Whatever it is *called*, it comes to the convict as the *result* of his crime."

⁷204 U. S., 664.

In *United States v. Chouteau*, 102 U. S., 611, it appeared that a law of the Congress (Rev. Stat., sec. 3296) provided that any one who removed distilled spirits from a bonded warehouse, on which the tax had not been paid, should be liable to a *penalty* of double the tax unpaid, and be subject to a fine, and to imprisonment.

Chouteau was indicted for unlawful removal, and a *civil* suit was also brought to recover double the tax. The *criminal* case was compromised. The Government accepted one thousand dollars in full satisfaction and compromise of the "indictment and prosecutions;" and they were dismissed.

He pleaded that compromise as a defense to the *civil* suit, and the plea was sustained. Mr. Justice Field said:

"Admitting that the penalty may be recovered in a *civil* action, as well as by a criminal prosecution, it is still a *punishment* for the infraction of the law. The term 'penalty' involves the idea of punishment, and its *character* is not changed by the *mode* in which it is inflicted, *whether by a civil* action or criminal prosecution." (102 U. S., 611.)

In *Atchison, T. & S. F. Ry. Co. v. United States*, 172 Federal Reporter, 195-197 (C. C. A., 7 Cir.), the Court said:

"The sections of the Safety Appliance Act involved are as follows:

"SEC. 4. That from and after the first day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of \$100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper District Attorney information of such violation as may come to his knowledge. . . ."

"The turning point of the inquiry, as already stated is, Was the prosecution under these sections a criminal prosecution as distinguished from a civil suit to recover a penalty? To begin with, let us eliminate some of the matters cited as criteria of what is a criminal and what a civil prosecution that are in fact no criteria.

The first, and the one evidently most relied upon is, that the act expressly provides that a common carrier violating the provision of the statute shall be liable to a penalty 'to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court having jurisdiction'—the gist of the argument being that inasmuch as the statute seems to contemplate the proceedings as a 'suit,' as distinguished from a criminal prosecution, it is a civil suit and not a criminal prosecution. But, as said by Mr. Justice Field, in *U. S. v. Choteau*, 104 U. S., 611 (26 L. Ed., 246):

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. . . . To hold otherwise would be to sacrifice a great principal to the mere form of procedure.

"To like effect is *Chaffee v. U. S.*, 18 Wall., 516 (21 L. Ed., 908), and *Wisconsin v. Pelican Ins. Co.*, 127 U. S., 265 (8 Sup. Ct., 1370; 32 L. Ed., 239).

"Another criterion urged upon us as showing that the proceeding is civil and not criminal, is the instructions given to juries in certain cases (*U. S. v. Central of Georgia R. R. Co.* [D. C.], 157 Fed. Rep., 893; *U. S. v. C. R. I. & P. R. R. Co.*, by Judge McPherson, of the Southern District of Iowa, 172 Fed. Rep., —, and *U. S. v. C. & N. W. R. R. Co.*, by

Judge Reed, of the Northern District of Iowa, 162 Fed. Rep., 775), that proof beyond a reasonable doubt was not required—decisions that are sound enough, the conclusion being assumed that they are civil and not criminal cases, but that do not go into the question of whether the assumption itself was sound or not.

“Wrongs are divisible into two sorts or species: Private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, and are, therefore, frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors. (3 Bl. Com., 2.)

“And as illustrative of the kind of wrongs that are ‘public wrongs,’ the Supreme Court of the United States, in *Wisconsin v. Pelican Ins. Co.*, *supra*, held that a so-called civil suit brought by the State of Wisconsin to collect a judgment rendered in one of its own Courts against an insurance company on account of penalties imposed by the statute for the violation of the laws of the State, was not of a civil nature; and, in *Boyd v. U. S.*, 116 U. S., 616 (6 Sup. Ct., 524; 29 L. Ed., 746), that a government proceeding *in rem* to enforce a forfeiture for a violation of the revenue law, and therefore in civil form, was in fact a criminal prosecution; and in *U. S. v. Choteau*, *supra*, under a law providing that for a violation of its provisions a holder should pay a penalty of double the tax imposed, the recovery by prosecution for the

penalty was in the nature of a criminal prosecution; and in *Lees v. U. S.*, 150 U. S., 476 (14 Sup. Ct., 163 (37 L. Ed., 1150)), that under an act providing that for a violation of the immigration laws, the offender shall forfeit the sum of one thousand dollars, 'to be sued for and recovered by the United States, or by any person who shall first bring his action therefor,' the prosecution is in its nature criminal. To like effect is *U. S. v. Burdett*, 9 Pet., 682 (9 L. Ed., 273); *Huntington v. Attrill*, 146 U. S., 657 (13 Sup. Ct., 224; 36 L. Ed., 1123); *U. S. v. Shapleigh* (Circuit Court of Appeals, Eighth Circuit), 54 Fed. Rep., 126 (4 C. C. A., 237), and *U. S. v. I. C. R. R. Co.* (D. C.), 156 Fed. Rep., 182—the latter being a decision directly upon whether an action brought like the one before us under the Safety Appliance Act, was a criminal prosecution.

"These decisions would seem to settle by authority, the question, in the United States Courts, notwithstanding some adverse decisions in the State Courts, such as *Proctor & Lohman v. People*, 24 Ill. App., 599; *State of Missouri ex rel. v. Kansac City, Fort Scott & Memphis R. R. Co.*, 70 Mo. App., 634; *Hitchcock v. Munger*, 15 N. H., 97; and *People of New York v. Wm. E. Briggs, et al.*, 114 N. Y., 56 (20 N. E., 820)."

In *Sevier v. The Justices, Peek* (Tenn.), 334, it appears that under the laws then in force in Tennessee, a County Court Clerk who failed to make certain reports, and to pay over certain revenues collected by him, as required, might be removed by the Justices of the County Court, and should not be eligible for re-election for ten years.

Sevier, the Clerk of the County Court of Washington County, was removed by the Justices. That action, or judgment of removal, was set aside by the Supreme Court of Tennessee for certain irregularities. But there were two things held in the case, namely: (1) that the Justices of the County Court could, upon proper notice, summarily remove the clerk for delinquencies of the character charged; (2) but he could be made *ineligible* for ten years, *only after* indictment or presentment and conviction by a jury, because *that* came as *punishment*. The right of *summary removal* is necessary in order to protect the State and the public from unfaithful and dishonest clerks; but *punishment* for the offense, for which the offender is summarily removed from a public office, must come, or be inflicted in the regular way.

As will be perceived, no narrow view was taken of the question in any of the cases. No narrow view will be taken *here*. When the Anti-Trust Act of 1903 makes it "a *conspiracy* against trade" to enter into agreements of a certain character, and punishes *persons* who are guilty by fine and imprisonment, and *corporations* that are guilty by dissolution or ouster, the *offense*, so far as corporations are concerned, must be regarded as a criminal offense, and the charge as a criminal charge, the same as in the case of natural persons. A corporation cannot be imprisoned in the penitentiary, but it can be fined. The Court below says that *if* a *fine* had been the punishment, this would have been a *criminal* case. (Rec., p. 522.) Surely the *nature*

of the case cannot depend upon an *accident* like that! The Legislature preferred to *punish* corporations for violating this act, by dissolution, or ouster, rather than by fine. That, however, does not alter the *nature* of the charge. It is a criminal charge, and the *punishment* comes, as stated by Mr. Justice Moody, *as the result of crime*.

For these reasons we maintain that this Anti-Trust Act of Tennessee is a *general criminal law*, and that it provides ouster as a *punishment*, and not as a *condition of doing business* in Tennessee.

We have discussed the proposition above stated at this length because it is desirable to have it settled that the Tennessee statute is a *general criminal law*, and not a statute prescribing the *conditions* on which foreign corporations are permitted to do business in Tennessee. *The Attorney-General, it will be observed, did not even contend in his brief on the motion to dismiss or affirm that the statute is one prescribing conditions of admission for foreign corporations.*

SECOND FEDERAL QUESTION RESTATED.

This Anti-Trust Act of Tennessee is void because it denies to corporations, put to answer the charge of violating its provisions, the equal protection of the laws, and denies that protection in these respects, namely: It ACCORDS to persons put to answer the charge of violating its provisions:

- (1) *The right to have a preliminary investigation by a*

grand jury; (2) the right to be tried by a jury; (3) the right to have their guilt established beyond a reasonable doubt; (4) the right to interpose and plead the statute of limitations as a defense when the statute has run; (5) the right to have a trial according to the usage and rules of the criminal laws of the land; but

It DENIES all these rights to accused corporations; and in the present case the statute of limitations had run and constituted a complete defense.

Constitutions do not receive technical interpretations. For example: The Fifth Amendment to the Constitution of the United States provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or *limb*."

The language of the Constitution of Tennessee is that "no person shall, for the same offense, be twice put in jeopardy of life or *limb*."¹

This language was employed when it was well understood what had happened in times gone by to the lives and limbs of persons accused and tried in England at common law. However, it was used to convey an idea far beyond, and in some respects different from, jeopardy to *life* and *limb*, merely. Nobody in America has been put in jeopardy of *limb*, even *once*, and therefore it is idle to declare that a man should not be put in jeopardy of "*limb*" *twice*.

¹Art. 1, Sec. 10.

It is obvious that something more than "limb" was meant and intended.

And when it is said that no person shall be twice put in jeopardy of "*life*," more than *life* is intended. This constitutional clause protects a person from being put in jeopardy of his *liberty*, or *property*, as well as of his life, twice for the same criminal offense. A man cannot be put in jeopardy of his limb at all. He cannot be put in jeopardy of either life or liberty twice for the same offense. And by "offense" is not meant merely an offense for which a man could have been put in jeopardy of life or limb at the common law. It means that he cannot be put in jeopardy of life or liberty, or *penalty*, twice for the same offense, whether that offense be a felony or a misdemeanor; whether it be punished by death, imprisonment in the penitentiary, imprisonment in jail, or by fine. It means broadly that a man shall not be *punished* twice, for *any* kind of criminal offense.²

A corporation is a "man" and a "person" within the meaning of the Constitution.³

²*State v. Hornsby*, 8 Robinson (La.), 554, s. c., 41 Amer. Dec., 305, 311; *In re Snow*, 120 U. S., 274; *Neilson, Petitioner*, 131 U. S., 176; *Berkowitz v. U. S.*, 93 Fed. Rep., 452, 454 (C. C. A. 3d Cir.).

³*Harbison v. Knox Iron Co.*, 103 Tenn., 429; *Ins. Co. v. Craig*, 106 Tenn., 624; *Dugger v. Ins. Co.*, 11 Pickle, 250; *Charlotte, etc., R. R. Co. v. Giles*, 142 U. S., 386; *Standard Oil Co. v. State*, 117 Tenn., 650.

The words "jeopardy of life or limb," give the Constitutional provision an ancient common-law complexion, but, as shown, they have never been restricted to their literal meaning, either by this Court or the Supreme Court of Tennessee. However, in construing *other* and kindred clauses of the Constitution of that State, *that* Court has departed from the American principle of construction, and has ignored the principle that while our ancestors brought with them to America the general principles of the common law, they adopted *only that portion which was applicable* to their condition.⁴

To illustrate: The Constitution of Tennessee provides that "no person shall be put to answer any *criminal charge* but by presentment, indictment, or impeachment."⁵ Also that "the right of trial by jury shall be inviolate."⁶

It would seem that the words "criminal charge" as used in this Constitution *ought* to mean, and were used to mean, *any* offense, whether a felony or a misdemeanor. Such is the construction placed upon these same words by the Supreme Court of Arkansas, in construing a clause of the Constitution of that State, identical with that of Tennessee.⁷ But the Supreme Court of Tennessee holds that a "criminal charge" within the meaning of Sec. 14, Art. 1,

⁴ *Van Ness v. Packard*, 2 Peters, 144.

⁵ Art. 1, Sec. 14.

⁶ Art. 1, Sec. 6.

⁷ *Eason v. The State*, 11 Ark. (6 Eng.), 481, 482.

of the Constitution of that State, means a common-law *felony* only, and does not include a "misdemeanor," for the reason that the words, says the Court, "are to be taken as having been used in a technical sense."⁸ It was held in the last case above cited that an accused person could be put to answer for a misdemeanor, without indictment or presentment. It was conceded in *McGinnis' Case* that for misdemeanors which were "gross and notorious," such as riots, batteries, libels, and other immoralities of an "atrocious" kind, the accused was put to answer at the common law, by "information," but that in all such cases, though proceeded against by information, the accused was *entitled to be tried by a jury*.⁹ It has always been the practice, both in North Carolina and in Tennessee, to prosecute misdemeanors by indictment or presentment, and not by information,¹ and so ancient and uniform has been this practice, the Attorney-General of Tennessee conceded on the trial of the case in the State Supreme Court, that under Tennessee's system of jurisprudence "no other form of prosecution, of either felony or misdemeanor, is known, save by indictment or presentment."² But the Court said in *McGinnis' Case* that this settled practice "weighs nothing," because the object of the Constitutional provision was,

⁸*McGinnis v. The State*, 9 Hump. (Tenn.), 48, 49;
State v. Sexton, 114 S. W. Rep., 494 (Tenn.),
1908.

⁹*McGinniss v. The State*, 9 Hum. (Tenn.), 48.

¹*McGinnis v. The State*, 9 Hump. (Tenn.), 50.

²Attorney-General's Brief, Trans., p. 487.

not to forbid the prosecution of misdemeanors by indictment or presentment, but to require "felonies" to be so prosecuted.

Nevertheless, as will be perceived, although "gross misdemeanors," such as libels, batteries, etc., could be proceeded against by "information," the accused was *entitled to a trial by jury*.³

Later (in 1869) in *Trigally v. Mayor, etc.*, 6 Coldw. (Tenn.), 382, it was held that persons accused of "small offenses," such as hunting, fishing, fowling, gaming, playing on the Lord's Day, swearing, drunkenness on Sunday, and the like, could be punished without trial by jury, or formal indictment or presentment, and by "summary and speedy and efficient proceedings," before a Justice of the Peace; and such seems to be the law in Tennessee now.⁴

It could readily be shown that a misdemeanor is a "criminal charge" within the contemplation of this clause of American Constitutions.⁵ It could also be shown that a felony at common law was an offense which resulted, upon conviction, in a *forfeiture* of lands and goods.⁶ Although

³*McGinnins v. The State*, 9 Humph. (Tenn.), 50.

⁴*State v. Sexton*, 114 S. W. Rep., 494 (Tenn., 1908).

⁵8 Amer. & Eng. Ency. Law, 279 (2d ed.); *Eason v. The State*, 11 Ark. (6 Eng.), 481, 482; *In re Shultz*, — Wright (Ohio), 280, 281; 2 Words & Phrases, 1741, 1736.

⁶8 Amer. & Eng. Ency. of Law, 280 (2d ed.).

death was usually inflicted, yet *punishment* did not enter into the true definition of a felony. It was a felony because of the *forfeiture*.⁷ Practically there never was any such thing as a common-law felony in the United States, because there has been no forfeiture of lands and goods for crime.⁸ If, however, the *punishment* inflicted upon the person be accepted as the true criterion, it follows that a felony at common law was an offense punishable by *death*, and it also follows that *if* a "criminal charge" is only such an offense as was punished by death at common law, an accused person in Tennessee can be put to answer all those offenses which were *not* punishable by death at common law, and which are now punished by imprisonment in the *penitentiary*, upon a criminal *information*, without indictment or presentment—so far as the *Constitution of Tennessee* is concerned. It follows that he has no *constitutional* right to demand that he be put to answer a criminal charge not punishable by death, or which was not punishable by death at the common law, by indictment or presentment. This, however, is not at all inconsistent with the proposition that under the *statutes* of Tennessee, no person can be put to answer any criminal charge, whether it be a felony or misdemeanor, otherwise than by indictment or presentment. An examination of the Statutes of Tennessee in force now, and at the time this Anti-Trust Statute was enacted, shows this to be true.

⁷*Ib.*

⁸8 Amer. & Eng. Ency. Law, 280, Note 6 (2d ed.).

The Code of Tennessee provides that "The *grand jury*, after being empaneled and sworn, shall be charged by the Court,⁹ and that "violations of the following provisions are to be given in charge specially: (36) *for suppression of conspiracies and trusts.*"¹

Section 7059 of the Code is: "But a prosecutor is dispensed with, and the district attorney *may* file bills of indictment, officially, and without a prosecutor marked on the same, in the following cases:" . . . Sub-sec. 23: "*Upon a charge of violating the law against conspiracies and the formation of trusts.*"²

Section 6949 of the Code is as follows: "All violations of the criminal law *may* be prosecuted by indictment or presentment by the grand jury, and a presentment may be made upon the information of any one of the grand jury."³

Sections 7094 and 7099 of the Code relate specially to indictments or presentments for gaming and libel—both misdemeanors. They provide what may be omitted from indictments, and what shall be sufficient to be stated.

Section 6973 of the Code defines an "information." It is not the information of the common law. The information of the statute is the written allegation made to any

⁹Shann. Code, sec. 7035.

¹Shann. Code, sec. 7036, sub-sec. 36.

²Sec. 6949 of the Code.

³Shann. Code, sec. 6949.

magistrate, that a person has been guilty of some designated public offense, for the purpose of taking the necessary steps to arrest and bind him over for further proceedings.

As will be seen from the foregoing sections of the Code of Tennessee, the Attorney-General of Tennessee correctly stated the *statute* law of Tennessee when he admitted on the trial of this case in the Supreme Court, that under Tennessee's system of jurisprudence "no other form of prosecution of either felony or misdemeanor is known, save by indictment or presentment."⁴ This, of course, leaves out of view altogether "small offenses," or those petty offenses for which only a small fine is imposed, and which may be dealt with by justices of the peace, or mayors of the towns.

"May" means "shall," when that is the meaning it ought to have in the statute. To say that "*all* violations of the criminal law *may* be prosecuted by indictment or presentment" must mean *shall*, because a large number of violations (that is, all that were felonies at common law) *must* be prosecuted by indictment or presentment by virtue of the requirement of the Constitution. As a general rule "may" means "shall" in statutes.⁵

⁴Attorney-General's Brief, Trans., p. 487.

⁵*Dollman v. Collier*, 92 Tenn., 664; *Barnes v. Thompson*, 2 Swan, 312; *Lewis v. State*, 3 Head, 149; *Farmers', etc., Bank v. Johnson*, 3 Humph., 26.

Undeniably, then, the *law* of Tennessee in force at the time the Anti-Trust Act of 1903 was passed, and which is still in force as to persons, and also as to corporations except in so far as the same may be altered by this Anti-Trust Act, is this:

1. It has always been *the practice* in North Carolina, and in Tennessee from the time it was cut off from that State, to put persons accused of offenses which are misdemeanors, to answer the charge by indictment or presentment, the same as in felony cases.⁶

2. If this Anti-Trust Act of 1903 had have imposed a *fine*; or if it had simply declared a violation of its provisions to be a "misdemeanor," *without* describing the form or mode of punishment, leaving that to the general provisions of the Code, an indictment or presentment would have been necessary and proper, even as against *corporations*.⁷

3. No other form of prosecution, either of felonies or misdemeanors, than indictment or presentment, has ever been known to Tennessee's system of jurisprudence.⁸

4. Under the *Constitution* of Tennessee, no person can be put to answer a criminal charge, which is of the dignity of a "felony" at *common law*, except by indictment or presentment.

⁶*McGinnis v. The State*, 9 Humph., 50.

⁷Op. Neil, J., Trans., p. 522.

⁸Attorney-General's Brief, Trans., p. 487.

5. Under the *Statutes* of Tennessee, no person can be put to answer any criminal charge (above a "small offense"), except by indictment or presentment.

6. Under the *Constitution* of Tennessee, persons accused of misdemeanors, in the absence of a statute can be put to answer the charge by information instead of indictment or presentment, but when charged by information, the accused is entitled still to a trial by a jury.

It is proper in this connection to ask, what is an information? It is a personal accusation preferred by the district attorney, instead of by the grand jury.⁹ However, the same trial by jury must be had and the same proceedings be followed in the Criminal Court, under an information as under an indictment. The only difference is that the accusation is preferred by the Attorney-General instead of by the grand jury.¹

It is conceded by the Supreme Court of Tennessee that *natural persons* accused of violating this statute, have certain defensive rights under the Constitution and laws of this State. These rights, which we have denominated "defensive rights," among others are the following:

⁹ *State v. Kyle*, 56 L. R. A., 120; s. c., 166 Mo., 287.

¹⁴ Black's Comm., 310; 4 Adjudged Words and Phrases, 3586, 3589.

(1) The accused must be put to answer the charge by indictment or presentment;²

(2) He must be tried by a jury of twelve men;

(3) The guilt of the accused must be established beyond a reasonable doubt.

(4) The statute of limitations may be interposed when the time has fully run, as a complete defense.

(5) All the defensive rights allowed in criminal prosecutions shall be enjoyed by persons put to answer the charge of violating this statute.

But the Court holds, and decides in the present case, that under this Anti-Trust Act, *corporations*, whether foreign or domestic, proceeded against for violating its provisions, enjoy *none* of the defensive rights above enumerated, secured to persons—*not one*.³

These rights are substantial ones. The right to have the accusation first considered by a grand jury, and by an untrammelled grand jury, is a substantial one. This Court has said that

“It is the right of the accused to have the question of his guilt decided by *two* competent juries, before he is condemned to punishment. It is his right, in the

²Brief of Attorney General, Record, p. 487; *Sevier v. Washington County*, Peck. (Tenn.), 339, 362.

³Opinion, Record, p. 520.

first place, to have the *accusation* passed upon, before he can be called upon to *answer* the charge of crime, by a *grand jury* of good and lawful men." (*Crowley v. United States*, 194 U. S., 473.)

The right to a trial by a jury, to have the question of guilt passed upon by twelve laymen and a judge, instead of by a single judge, is a substantial and cherished one.

The right to have one's guilt established beyond a reasonable doubt, instead of by a mere preponderance of the evidence, is obviously a most valuable one.⁴

In Tennessee, the statute of limitations is a complete defense. When it has run, the accused cannot be criminally punished.⁵

The reasoning, in the opinion of the learned State Judge, whereby the conclusion is reached that the Anti-Trust Statute of Tennessee, which accords these defensive rights to *persons*, and at the same time *denies* them to *corporations*, is valid, is *in substance*, this:

Judgments against corporations, of dissolution and of ouster, are mere *civil* judgments. *Quo warranto* was the procedure by which corporations were dissolved at common law, and *it* was not a criminal proceeding. A bill in equity upon relation is the pro-

⁴23 Am. & Eng. Ency. Law, p. 948 (2d ed.)

⁵*Turley v. The State*, 3 Heisk. (Tenn.), 11. To the same effect are 33 Texas, 22; 17 Florida, 195.

cedure in Tennessee which has been substituted for *quo warranto*, and it is not a criminal proceeding; and it is the proceeding prescribed by this Anti-Trust Act. Moreover, the bill in equity upon relation, is the proceeding which this Court has heretofore said is the proper proceeding to oust a foreign corporation. Inasmuch as this bill in equity upon relation, is merely a *civil* proceeding, neither the constitutional requirement that no person shall be put to answer any criminal charge, but by indictment or presentment, nor be put to trial otherwise than by a jury, nor the rule that guilt must be established beyond a reasonable doubt, nor the rule that the statute of limitations (effective as a defense in criminal cases) have any application to proceedings against *corporations* under this Act. The reason is, that these defensive rights exist only in *criminal* proceedings. They do not exist in *civil* proceedings, and this proceeding is purely a civil one.

Moreover, it is reasonable to provide a civil remedy against corporations, and a criminal one against persons for violating the same general law, for the reason that corporations cannot be imprisoned, while persons can. And, ouster can be inflicted on corporations, and cannot be inflicted on persons.

Undeniably, if this statute had have imposed a *fine*, instead of dissolution, or ouster, on offending corporations, or had stopped short of prescribing the punishment by merely denouncing violations of its provisions as unlawful, leaving the *punishment* to be inflicted under the general provisions of the Code, indictment and trial by jury, according to the usual course in criminal proceedings, *would* have been necessary.

But inasmuch as the *punishment* which is to be inflicted is specifically defined by the statute, and is a *punishment* that is peculiar to corporations, the statute is valid. (Trans., pp. 520, 522.)

It will be observed that the Court, in no part of its opinion contends that the *offense* is, or that it can be *different* when committed by persons, from what it would be when committed by corporations. The unlawful *offense* is necessarily the same, whether committed by the one or by the other. Such offense not only violates the statute in the same way, but it affects commerce in the same way, whether committed by natural or artificial persons. The *offense*, and the *effect* of that offense, are precisely the same in both cases.

The primary object of a trial is to ascertain whether the accused is guilty, and then to punish, if guilt be established. In order to meet the ends of justice, certain rules have been established, some of them by the Constitution itself, for the conduct of these trials. In all fairness and justice, inasmuch as the *offense*, whether committed by natural or artificial persons, is *precisely the same*, there can be no reason why the *quantum* of evidence required to establish guilt, should not in both cases be the same. If the matter ought to be investigated by a grand jury, and the case tried by a jury in one case, surely ought it also in the other. And if the statute of limitations be available to natural persons as a defense, so also ought it to be available to corporations.

The view of the Supreme Court of Tennessee, presented in the opinion as an answer to the foregoing, is that unless the statute imposes a money fine, the same *punishment* cannot be meted out to natural and to artificial persons, because of their different natures. Undoubtedly, there are some punishments which can be imposed upon natural persons that cannot be inflicted upon corporations. A corporation cannot be imprisoned. But the fact that the same *kind* of punishment cannot be inflicted, is no reason why that for the *same* offense the same kind of a *trial* to determine the question of guilt or innocence shall not be had, and the same rules of evidence be employed, and the same rights of defense be allowed to both, equally and alike.

The Supreme Court of Tennessee thought, inasmuch as the procedure employed for many years to *dissolve* corporations, is a *civil* proceeding, and therefore one which *excludes* indictment, trial by jury, proof beyond a reasonable doubt, the defense of limitations, etc., that therefore it is entirely allowable to adopt it here to dissolve corporations, or to oust them, even though the object is *punishment*.

But this overlooks the fact that the primary question in a proceeding under this statute is the establishment of guilt, and that punishment is a consequence, or secondary step in the proceeding. It by no means follows that because such a procedure (that is, a mere *civil* procedure)

has been employed in times past to prevent usurpation and to dissolve corporations (*not to punish them*) it may now be used to establish guilt for the violation of a general criminal law, when that same procedure is not employed to establish the guilt of persons accused of similar violations of the same law; and particularly is this true when there is a new law, the Fourteenth Amendment to the Constitution of the United States, paramount to all statutes, which secures to corporations as well as persons, the equal protection of the laws.

The question is not, how we were accustomed to proceed in times past, against corporations for *corporate* misconduct; but it is, how shall corporations be proceeded against *now*, since the Fourteenth Amendment, to *punish* them for offenses against *general criminal laws*, committable by natural and artificial persons equally and alike? It is not a question of the procedure to be employed against corporations for wrong-doing *as corporations*, but it is one as to the procedure to be employed against them as *criminals*—for committing *crimes* committable by them and natural persons equally and alike, at the same time and in the same way.

Assume, for argument, that the procedure may be different in some respects, because of certain differences between natural and artificial persons, nevertheless, the different procedures equally and alike should regard, and safeguard, the *defensive rights* of the accused. The reason

is that these rights are in no wise affected by those differences which we do find existing between natural and artificial persons.

Assume, further, that a bill in equity upon relation, is a proper procedure for the dissolution or exclusion of corporations for violations of the general criminal laws, nevertheless, must there not be the same defensive rights—that is, the same rights as to trial, proof, and defense? And if these be withheld, has there not been a denial of the equal protection of the laws? The answer that the Supreme Court of Tennessee has made in its opinion, to meet these suggestions, we respectfully submit, when analyzed, is *no answer at all*. That Court says:

“If the statute had declared a *fine* against it (the corporation), an indictment *would* have been proper; or if the Act had simply declared unlawful the things it denounced, there might still have been an indictment, as for a misdemeanor; but having declared, in terms, the legal consequence of a breach of the legal inhibition, there could be no indictment. But the Defendant says: *‘The legal consequences of the breach I am to have imposed upon me, and am to suffer through the machinery of a court of equity, where I cannot have the benefit of the reasonable doubt, or the benefit of the statute of limitations which the sovereign concedes in criminal cases, but does not in its own courts in civil suits, and I am also deprived of the right of a general verdict of guilty or not guilty, according to the course of practice in criminal courts.’*

“But suppose I turn the case about, and consider

what a natural person might say. He complains: '*I am subjected to the humiliation of an indictment for a felony, and if convicted I may be sent to the penitentiary for a term of years, while a corporation that does the same thing is subjected merely to the loss of a civil power, the right to do business; while I am subjected to the humiliation of the criminal court, a corporation for the same act enjoys the benign principles that are administered in a court of equity.*' Is not the case of a natural person as strong, in the matter of discrimination, as that of a corporation? What then? Is it true that for the same breach of duty a corporation and a citizen must both be indicted? Although owing to the different natures of the natural person and the legal person, the same punishment cannot be inflicted? Although it is impossible to reach the same end as to both by the same means? Although as to the natural person it may result in imprisonment in the penitentiary for ten years, and as to the corporation only in a fine, or money judgment? Would there be no inequality in that result? But it will be said, that the Legislature *might* have authorized an indictment and annexed as punishment forfeiture of corporate franchises in case of domestic corporations, and ouster for foreign corporations? If so, there would have been converted into a criminal sentence a judgment which has been from time immemorial held to be but a civil determination. Shall all these *hoary precedents* be overturned to attain a *state of harmony with an abstract theory*? The true theory is that corporations and natural persons are *so diverse* in some respects, that there is *no basis or common ground* of comparison, *but a necessity of simple antithesis.*

And such is the particular aspect in which they are presented in the present litigation.” (Opinion, Record, p. 522.)

This reasoning, as will be perceived, *in substance* is, that although corporations *are* discriminated against by the statute in the respects now complained of, yet it is also true that persons are discriminated against in some other respects also—that is (apparently), that the mistreatment of both by the same statute operates as a kind of set-off to so neutralize their mutual injustices as to *result* in the equal protection of the laws. This also means that corporations and persons are so “diverse in some respects” that there is no basis of comparison between them, and “a necessity of simple antithesis.” This, we understand to mean that because natural and artificial persons differ in *some* respects, they must in *all* cases be considered in *contrast*, the same as if they differed in all respects. This, we submit, is another “*illation*” which is not “logical.”

For, as will be observed, the discriminations and inequalities of which the Standard Oil Company complains, do not relate to the *nature* of the *punishment*, but to the *rights of trial and defense*. It complains that this statute denies to all corporations, and therefore to it, the equal protection of the laws, and deprives it of its property without due process of law in the specific particulars hereinbefore mentioned.⁶

⁶See page 121, within.

When the learned Judge "turns the case about," (as will be perceived) he *does not deny* that the discriminations complained of are made by the statute. Upon the contrary, he concedes them to exist⁷ But the answer made, to justify and sustain the statute, is that the State has the right to do this because these discriminations *result* from the use of a bill in equity, in place of an indictment at law, which the Legislature was *warranted* in employing. The contention is that notwithstanding these results, inasmuch as a bill in equity is a *civil* proceeding, the "hoary and venerable" proceeding that has been used a long time to dissolve corporations *for wrong-doing as corporations*, the statute is now held to be valid.

The distinction between (1) the nature of the *punishment*, and (2) the *defensive rights* of the accused, or, the rights of trial and defense which accused *persons* enjoy, appears altogether to have escaped the sagacity of the learned Judge. It is true that a corporation guilty of violating this or any other statute, cannot be imprisoned. True it also is that a natural person can. That may be and indeed is, a good reason for imposing *different kinds* of punishment, but obviously it is *no reason* at all why the *guilt*, on account of which the punishment, whatever may be its form, is inflicted, shall be required to be established by the proof, beyond a reasonable doubt as to natural persons, and by a bare preponderance of evidence as to artificial persons.

⁷Opinion, Record, pp. 520, 522. *Supra*, p. 127.

The same thing is to be observed with respect to the trial of persons by a jury and a judge at law, and the trial of corporations by a judge alone in equity, to establish guilt. Because the *punishments* imposed by the statute may be different; because a corporation cannot possibly be imprisoned, while natural persons can, is no reason why the tribunal which is to determine the question of *guilt*, and the number of persons who are to decide it, shall be different. A distinction is made where no reason or grounds whatsoever for discrimination exist.

In one part of the opinion of the learned Judge below it is stated that a jury may be called for on a trial in the Courts of Chancery in Tennessee. Indeed, the learned Judge at first declared that

“the right of trial by jury, the deprivation of which is complained of in the assignment of errors, is preserved under section 5172.⁸

But, he immediately added:

“It is true that a jury is *not* permitted in cases of this kind to render a *general verdict*, as in ordinary cases at common law.”⁹

As will be observed, this was in reality a recantation of the first statement, and for the reason that the learned Judge must have recalled that in Tennessee it has long been

⁸Section 3416 of the Code; Record, Opinion, p. 520.

⁹Opinion, Record, p. 520.

the settled law that a jury does not *try* a case in equity at all. It renders neither a general *verdict*, nor a special *verdict*. In Tennessee a jury may be called for, to determine *issues* of fact, in any chancery case. The party calling for the jury may submit such of the "issues" raised by the pleading, as he sees fit, but is not obliged to submit *all* the issues raised by the pleadings because he has called for a jury. The jury does not return a general verdict, nor a special verdict. It responds to these issues or questions, and answers *them*. Thereupon the Chancellor, assuming the facts to be as the jury has found the issues, considers them, and such other relevant matters as may not have been submitted, if any there be, and decides and determines the case himself.¹

It is obvious that the right of trial by jury is not preserved by the section of the Code to which the Attorney-General refers.

Now with respect to the defense of the statute of limitations: This discriminating denial is said in the opinion of the learned State Judge to be justified upon the ground that the statute prescribes the bill in equity upon relation as the procedure—a *civil* proceeding, and one in which the statute of limitations cannot be pleaded against the *State*:

¹*Ragsdale v. Gossett*, 2 Lea, 739; *Perry v. Clift*, 54 S. W. Rep., 128; 16 Cyc., 418; *Conner v. Frierson*, 98 Tenn., 183.

It is justified also upon the ground that the offense committed by *persons*, is a *felony* as to which the statute of *one* year, sought to be relied upon in the present case, is not pleadable as a defense. This argument appears to lose sight entirely of the ground of the Defendant's complaint. The Standard Oil Company does not contend that *this* proceeding is a criminal proceeding, nor that *quo warranto* was always a criminal proceeding. Upon the contrary, it complains because the procedure is civil, and for that reason is now held to cut off the defense of the plea of statute of limitations; which would be a good defense in the present case, if the Company were proceeded against as natural persons must be—by indictment or presentment.

The complaint is that the procedure unjustly discriminates against the Defendant because it is precisely of *the* character, and precludes the Defendant precisely in *the* manner, that the State Court says it does. The fact that it was the practice at common law to proceed against corporations for a *corporate* wrong, for some sin against the law of *corporate* being, through a *civil* proceeding, is no reason why persons and corporations should be proceeded against *now* for committing the same *crime*, or for committing an offense against some general *criminal* law, by *different* procedures. When it is recalled that the Fourteenth Amendment secures to corporations the equal protection of the laws, whatever may have formerly been the procedure against corporations for *corporate* offenses, no such procedure for *crimes* against general laws can now be put in

force against them, *unless* their *defensive rights* under such procedure, are preserved, and are the same as those which natural persons possess when accused of, and put on trial for, the same crimes.

Nor is it true that the offense when committed against this statute *by corporations*, is a felony. *The State Court really does not so decide.* Our contention below was, and it still is, that the offense of violating this Anti-Trust Act by a corporation is a misdemeanor. The State Court held that this offense is a "felony" so far as *persons* are concerned; and it based this holding upon the ground that under the *Code* of Tennessee, any offense that may be punished by imprisonment in the *penitentiary* is a felony. On that point the Court, quoting from a *previous* opinion, said:

"The fact that the punishment for the attempt is in the *alternative*, either by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, does not make it any less an offense punishable by imprisonment or take from it the characteristic of a felony. Therefore the limitation for misdemeanors would not apply, and the case does not fall within any of the accepted classes of felonies." (Opinion, Record, p. 524.)

As will be observed, *this was said with respect to persons alone.* And it is obvious that it must be restricted to them.

It *cannot* be applied to corporations, because corporations *cannot be imprisoned* in the penitentiary. For if it be applied to corporations, it absolutely *overthrows* the argument upon which the conviction in the present case is attempted to be sustained. The basis of the Court's holding is, that the judgment here pronounced is *not a criminal sentence*, but a *civil judgment*; that this is *not a criminal proceeding*, but a *civil one*, and that therefore the rules of law applicable to criminal procedure do not apply, and the *defensive rights* which are enjoyed in such cases, do not exist. Manifestly, it would be illogical, and destructive of that view, for the Court by such reasoning as *that* above referred to, to make the offense of violating this statute when committed by a *corporation a felony*, in order to escape the plea of the statute of limitations of one year. The Court said the offense was a felony when committed by a *person, because*, under the general provisions of the Code, that person *could be put in the penitentiary*. If that reasoning *is* to apply to corporations, it must be applied upon the grounds that the punishment is to be regarded as the *equivalent* of imprisonment in the penitentiary; and if imprisonment in the *penitentiary* is the punishment, the case is then *certainly one for criminal procedure*, wherein the defensive rights which have been denied in the present case must be enjoyed.

The argument of the State Court is, that under the Act of 1873 (Shannon's Code, sec. 7185), persons violating the Anti-Trust Act of 1903, are guilty of a "felony," because

that it provides that they may be imprisoned in the penitentiary.² Being a felony, the statute of one year, which is applicable to misdemeanors, could not be pleaded, even by persons, in a criminal case. That is the argument of the Supreme Court on this point. If that argument be sound, corporations cannot be guilty of a felony in violating this Anti-Trust Act, because what is said in section 7185 of the Code *cannot* apply to them. It cannot apply, because *they* cannot be imprisoned in the penitentiary.

If section 7185 of the Code makes a natural person's offense a felony because he *can* be put in the penitentiary under the Anti-Trust Act, it cannot make a corporation's offense under that Act a felony, for the obvious reason that a corporation *cannot* be put in the penitentiary. The fact that persons *may* be put in the penitentiary, cannot be used as a basis for an argument against corporations which *cannot* be put in the penitentiary. *Consequently, in this respect we must look to the Anti-Trust Act alone.*

That Act cannot be helped out, in *this* respect, by section 7185 of the Code. That section relates to offenses under statutes which makes given acts criminal or unlawful, *without* classifying or grading the crimes. If, for example, a statute should provide that the offense which it creates and declares to be unlawful should be a "misdemeanor," or that it should be a "felony," it is a misdemeanor or a felony accordingly, by virtue of the specific, express terms of that

²Opinion, Record, p. 524.

statute. But if another statute says that a given act or offense shall be "unlawful," *without* specifying whether it shall be a "felony" or a "misdemeanor," section 7185 of the Code comes into play and makes that unlawful act or offense a felony or misdemeanor according to the *punishment* that has been prescribed by the statute which made the act unlawful. If that statute expressly prescribes imprisonment in the penitentiary, the offense is a felony; if it prescribes a fine or imprisonment in jail, it is a misdemeanor.

The Anti-Trust Act of 1903 prescribes *neither* fine nor imprisonment of any kind, as the *punishment* of offending *corporations*, either domestic or foreign; consequently the offense of violating its provisions when committed by corporations, is not within section 7185 of the Code, and that section can have no relation whatever to such offense.

Upon the other hand, this anti-trust statute expressly says that—

"Any violation of the provisions of this Act shall be deemed, and is hereby declared to be, destructive of full and free competition, and a CONSPIRACY AGAINST TRADE," etc.

As will be observed, it not only forbids certain acts, but it expressly says what offense these forbidden acts shall be. It says that any such forbidden act shall be deemed, and shall be, *a conspiracy against trade*. Authorities need not be cited to show that a conspiracy against trade was not a felony, but only a misdemeanor, at common law.

By the Code of Tennessee, a conspiracy against trade is made a misdemeanor.³ Reading this general Code, and the later anti-trust act together, as all acts *in pari materia* must be read, and as acts subsequent to the Code relating to the same subjects must be read in Tennessee,⁴ we find this to be true: Under the Code, all "conspiracies against trade" are misdemeanors; and under the Anti-Trust Act, all violations of its provisions are "conspiracies against trade." That is to say, under the Code and the Act taken together, the offense committed by the Defendant, in violating the Anti-Trust Act, is a *misdemeanor*. The statute of limitations as to all misdemeanors (except gaming) is twelve months.⁵

The Supreme Court of Tennessee holds that this statute (of twelve months) does not apply in the present case, for the reason (says the Court) that there is *no* statute of limitations applicable to the State in *civil* actions, and this is a "civil" action.⁶

Therein lies the statute's infirmity. The plea of limitations is pleadable and cannot be cut off by the *form* of the procedure.

³Shann. Tenn. Code, secs. 6736, 6993, 6694.

⁴11 Ency. Dig. Tenn. Rep., 532; *Cowan v. Murch*, 13 Pickle, 590; *Carroll v. Alsup*, 23 Pickle, 273; 58 So. West. Rep., 756.

⁵Shann. Code (Tenn.), secs. 6942-5; Opin., Rec., 523.

⁶Opinion, Record, p. 523.

As before stated, the opinion discusses section 7185, but solely in its relation to *persons*. Really it does not assume to apply that section to corporations. It could not do so, for *that* would be to make the case a *criminal* one; to deal with it as one in which the punishment inflicted was construed to be the *equivalent* (in law) of imprisonment in the *penitentiary*.

The statute of limitations of one year is a complete defense in Tennessee, when it is pleadable.⁷ The conspiracy agreement complained of was made, and ended, on the 12th day of October, 1903. This bill was brought on the 16th day of March, 1907, more than three and a half years after the offense was committed.

It is respectfully submitted also that the opinion of the learned Judge is contradictory in its dealing with the obstacles that were interposed to a conviction in the present case. In one part of the opinion it is said that the provisions of the Tennessee Code as to "Bills upon relation," are "entirely new," though intended to serve the same purpose as *quo warranto* proceedings, and that while in practice it is "assimilated as far as may be convenient to the old practice," this "does *not* apply to absolute rights inhering in the new process inaugurated by the Code."⁸

⁷*Turley v. The State*, 3 Heisk., 11; Shann. Code, secs. 6942-5.

⁸Opinion, Record, pp. 520, 521.

And yet, in another part of the opinion the Court said :

“But will it be said that the Legislature might have authorized an indictment and annexed as *punishment* the forfeiture of corporate franchises in case of domestic corporations, and ouster for foreign corporations? If so, there would have been converted into a criminal sentence, a judgment which has been from time immemorial, held to be but a civil determination. Shall all these *hoary precedents* be overthrown to attain a state of harmony with an abstract theory?”⁹

Comparing these two abstracts from the opinion, it will be perceived that when the Court is engaged in removing one obstacle in the way of conviction, the procedure employed in the present case is said to be “entirely new,” and though assimilated as far as may be correct to the old practice, it does not apply to those absolute rights “inhering in the *new process* inaugurated by the Code.” That is to say, the procedure in this respect is *new*. Nevertheless, when in a different connection the opinion is beating down another obstacle to conviction, the Court almost pathetically raises its voice against the overturning of “hoary precedents,” and that, too, even though it is done to obtain the equal protection of the laws, or as the Court prefers to phrase it, “attaining a state of harmony with an abstract theory.”¹⁰ It is not clear from the opinion whether the Court means to say that the Legislature *could not* have

⁹Record, Opinion, p. 523.

¹⁰Record, Opinion, p. 523.

authorized an indictment and annexed as a punishment a forfeiture of corporate franchises in the cases of domestic corporations, and ouster in the case of foreign corporations, for the reason that *that* would have been to convert a civil judgment into a criminal sentence; or whether the Court means to say merely that it would be *unwise* and impolitic to *indict*, instead of proceeding by bill in equity upon relation—unwise and irreverent; for the reason that “*hoary precedents*” would be overthrown to “attain a state of harmony with an abstract theory,” and a shocking thing thereby be done. If it was meant to say that the Legislature *could not* have done it, then it is said in apparent forgetfulness of the fact that the Court elsewhere had *admitted* that if the Act had seen fit to impose a *fine*, or had been *silent* as to the punishment, it would have been regular, and the proper proceedings would have been by indictment, or presentment, according to the course of the criminal law;¹ and it also said in forgetfulness of the fact that the Legislature of Tennessee has discarded the “*hoary precedents*” referred to. Chapter 89 of the Acts of Tennessee of 1907 is an illustration. It is an Act which makes it a felony for any person or corporation to keep a place for betting on horse-racing. It provides that any *person* who violates its provisions should be fined and imprisoned in the penitentiary, and that any *corporation* violating its provisions should be fined “and in addition to such fine, its charter shall, *by such court* be adjudged to be forfeited, and

¹Record, Opinion, p. 522.

its corporate existence and right to do business in this State cease and determine.” Forfeiture is expressly made a *part* of the punishment, and the judgment of forfeiture is a part of the judgment of conviction, by the Court which tries the case.² It may be that a bill in equity could conveniently follow such judgment when the corporation is a *domestic* one, in order to wind up its affairs. A court of equity has ample jurisdiction to entertain such a bill, without an enabling clause. No such provision in the statute was necessary. In the case of *foreign* corporations, there are no affairs to be wound up. The corporation is forbidden to do business, and merely *ceases* to do business in Tennessee.

CLASS LEGISLATION.

Undeniably, it is competent for the Legislature of Tennessee to legislate with reference to *classes*—to prescribe different rights and duties, and different punishments, for different classes. For example: If a given offense be of such gravity that the Legislature conceives that *persons* who are guilty of committing it should be imprisoned for as much as ten years, and *corporations* guilty of the same offense should be dissolved or ousted, the fact that it is physically impossible to imprison a corporation is a good reason for the difference in the *punishment*. But class legislation, in order to be valid and constitutional, must always have a *reasonable relation to the nature of the sub-*

²For this Act, see Appendix, p. 164.

ject. It cannot be capricious or arbitrary. The rule has been both enounced and established by decisions of this Court, and also the Supreme Court of Tennessee.

Santa Clara v. Southern Pacific R. R., 118 U. S., 394, is the case in which it was *first* held that corporations are *persons* within the meaning of the Fourteenth Amendment; and it was so held *without argument*. Before argument began, Mr. Chief Justice Waite said:

“The Court does not wish to hear argument on the question whether the provisions in the Fourteenth Amendment to the Constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.”

And in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U. S., 151, 154, this Court said:

“It is well settled that corporations are persons within the provisions of the Fourteenth Amendment to the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

“But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States

the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While as a general proposition this is undeniably true, yet it is equally true that such classification *cannot be made arbitrarily*. . . .

“That (the basis) for the attempted classification must always rest upon *some difference* which bears a reasonable and just *relation* to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis.”

Among other authorities cited to support this proposition is *Dibrell v. Morris' Heirs*, 85 Tenn., 499, 535.

In *Pembina Mining Co. v. Pennsylvania*, 125 U. S., 188, this Court also said:

“The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or *class* of persons from being *singled out* as a special subject for discriminating and hostile legislation. Under the designation of ‘person’ there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name and have a succession of members without dissolution. As said by Chief Justice Marshall, ‘The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.’ ”

In *Maxwell v. Dow*, 176 U. S., 596, the Court said:

"The nature or character of the right of trial by jury is *the same* in a criminal prosecution as in a civil action, and in neither case does it spring from, nor is it founded upon the citizenship of the individual as a citizen of the United States; and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen." (176 U. S., 596.) . . .

"It appears to us that the questions whether a trial in criminal cases, not capital, shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime, a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State, themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the *same kind of procedure*, and to have the *same kind of trial*, and the *equal protection* of the law is secured to them." (176 U. S., 604.)

Dissenting from the proposition that practical exclusion of colored persons from the jury was a denial of that equality of protection secured by the amendment, Mr. Justice Field said, in *Neal v. Delaware*, 103 U. S., 370, that—

. . . "equal protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the amendment, when its courts are open to them, on the same condition as to others with *like*

rules of evidence, and mode of procedura, for the security of their persons and property, the prevention, and redress of wrongs, and the enforcement of contracts; when they are subject to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuit of happiness which do not equally affect others; when they are liable to no other nor greater burdens and charges than such as are laid upon others; and when no different nor greater punishment is enforced against them for a violation of the laws."

In *Brown v. New Jersey*, 175 U. S., 172, it was said:

"The State has full control over the procedure of its courts, both in civil and criminal cases, subject only to the qualification that *such procedure must not work a denial of fundamental rights*, or conflict with specific and applicable provisions of the Federal Constitution."

The proposition that equal protection of the laws requires that the courts shall be open to parties accused on the same condition as to others with like rules of evidence and modes of procedure for the security of their persons and property has not been denied in any case.

This is also the rule in Tennessee. The classification must not be arbitrary, but reasonable and natural.¹

¹*Stratton Claimants v. Morris*, 89 Tenn., 479, 453; *Sutton v. State*, 96 Tenn., 709; *Burkholtz v. State*, 16 Lea, 72.

Even when the *classification* is not arbitrary or unreasonable, but the *discrimination* is based upon matters that have *no relation* to the object, and support no such discrimination, the legislation is invalid.²

An arbitrary or unreasonable discrimination or classification by a State statute, is a denial of the equal protection of the laws.³

All this means that *different* laws may, indeed should, be made not only for different things, but also for different *classes* of things, when the classes are characterized by peculiar qualities to which the differing laws will have just relation. Men, women and children are all persons, but these classes of persons differ so greatly in *some* respects, as to require different laws and regulations. But in so far as persons are *alike*, whether they be men, women or children, the laws which control them must be equal and uniform.

And so it is with corporations. Corporations are *persons* within the contemplation of the law, for many purposes and in many respects. In so far as natural persons and artificial persons (corporations) are the same, the laws should be the same—indeed must be the same in order that equal protection shall be afforded.

²*Atch.*, etc., *R. R. v. Matthew*, 174 U. S., 105.

³*Colting v. Kansas City, etc., Co.*, 183 U. S., 79, 105; *Atchison, etc., R. R. Co. v. Matthews*, 174 U. S., 105.

However sharply defined a *class* may be, laws applicable to this class must be uniform and general, unless the class has some *distinctive* characteristic to which laws of a class-nature will have a reasonable relation. It is not sufficient in order for a class-law to be valid, that it can be shown to relate to a *class*. It must have also a reasonable relation to some *distinctive* characteristic of that class, fairly calling for special legislation.⁴

Tested by these principles, obviously it is not sufficient for the State Court to show that natural persons and artificial persons are unlike in *some* respects, in order to sustain the statute on which the present proceeding is based.

That natural persons may be imprisoned, while artificial persons cannot, *is* a sufficient reason for prescribing different *kinds* of punishment—punishment adapted to the offenders; but it is no reason at all for prescribing different kinds of *trial* to determine the question of guilt, and different *quanta* of evidence to establish guilt.

Inasmuch as corporations commit crimes *only* through natural persons, through agents whose guilt is *imputed* to the corporations, no reason can be imagined why, for the offense of violating a *general criminal law*, natural persons should be put to answer the charge, or be tried, in a way to *enjoy* the defensive rights hereinbefore described, while artificial persons are required to be tried in a way in which all these defensive rights are *denied*.

⁴174 U. S., 105; 165 U. S., 154; 85 Tenn., 499, 535.

Not only is there no reason for such a discrimination, but there is a Constitutional inhibition against it. It is forbidden because it is a denial of the *equal protection of the laws*, and of due process of law.

The Attorney-General concedes that proceedings *quo warranto* have never been in force in Tennessee.⁵ The Bill in Equity upon relation, which has been substituted for *quo warranto* in Tennessee, is employed against corporations *as such*—for some sin against the laws of *corporate* being. It has not been employed to *punish* them for *crimes* which are violations of *general* criminal laws. Assuming that this proceeding *may* be employed if the Legislature be so minded, it must be employed *subject to the Fourteenth Amendment*. If the same defensive rights accorded to criminal *persons* when accused of violating a *general* criminal law, are accorded to criminal *corporations* when so accused, the demands of the Fourteenth Amendment are satisfied, since the law regards substance rather than form. If the two accused offenders are given the same hearing, and the same rights of jury trial, and guilt is required to be established by the same *quantum* of evidence, and they can equally interpose any defense that exists, it matters not whether the accusation be in the *form* of an indictment or of a bill in equity. *Equal protection* is the essential thing.

The Attorney-General's view appears to be that a law is "equal protection" which applies to all persons of a *class*

⁵Brief, on motion to dismiss or affirm, p. 46.

alike, for he argues that this Tennessee statute is unobjectionable inasmuch as it provides that *all corporations* accused of violating the provisions of the Act must be proceeded against by bill in equity upon his relation. But, as previously explained, this is not an adequate view. If the *offense* were one *peculiar to corporations*, the Attorney General might be right. In *such* case a statute for the punishment of an offense, applicable to *all* corporations, would not be "unequal" or partial. The offense of which the Standard Oil Company is accused is not peculiar to corporations. It is one committable by natural and artificial persons equally and alike. It is a violation of a general criminal law—a conspiracy against trade which any person, natural or artificial, engaged in trade, may commit.

Even though a statute relates to *all* the individuals of a *class*, it is partial and unequal if it be not related to some feature or characteristic which is peculiar to the class.⁶

For example: An act making it unlawful for any miller to adulterate flour by adding corn-meal would be valid; but an act making it unlawful for any miller whose mill is operated by *steam power*, or who is a corporation, to so adulterate his product, would be void. Why? The statute applies to the *class* as a whole—to *all* steam mills. But it does not apply to water mills, and mills run by electricity, or (in the second case) to natural persons. And while this act applies to the entire *class* of steam mills, the *feature* to

⁶*Atchison, etc., R. R. v. Matthew*, 174 U. S., 105.

which it applies, is not peculiar to the class, and therefore the act is void. No reason exists why flour made by steam mills, or by mills operated by corporations, should not be adulterated, while flour made by other mills or by natural persons may be adulterated.

And so it is here. This statute forbids conspiracies against trade, whether the offender be a natural or an artificial person—which is good. No reason for a distinction exists. It provides different *kinds* of punishment—which is also good, because they *cannot* be punished severely in the same way.

But it provides different forms of procedure to establish the guilt of the accused, in order to punish—for which no good reason can be given. If the *effects* and results were the same, there would be no objection to the different forms of procedure, since substance and not mere form is to be regarded.

But one form of procedure accords certain important *defensive rights*, which the other form wholly *denies*. The effect is to make what appears on the surface to be a mere matter of form, a matter of *vital* substance.

Let us now apply these principles to the present case. Is there any reason why, for the same criminal offense, *persons* should have the right to have the question of whether an accusation *should* be brought, to be first determined by a grand jury, while *corporations* are *denied* this right?

Is there any good reason why, for the same offense, natural persons shall have the right of trial by jury—that is, the judgment of twelve laymen and a judge—as to their guilt or innocence, while corporations are required to submit to the judgment of the judge alone? Particularly should no such discrimination be made when it is remembered that the guilt of a corporation is *imputed* guilt. The *stock* of a corporation is usually owned by numerous shareholders who have but little knowledge of the management. What has been done is reported to annual meetings *after* it has been done; but as a matter of fact they know, and can know, but little of that which is done, *at the time*. When a corporation is dissolved, or ousted, because of a violation of law, the stockholders are those who suffer, and they suffer for offenses in which they do not participate, and of which, in the nature of things, they could have little or no knowledge until the coming-in of the annual *report*. Nevertheless, their innocence is not, and on grounds of public policy it should not be, a defense. *On grounds of public policy* they should be held to lose their property, if the agents of their own selection violate the laws; for otherwise, those who profit by the agents' wrong-doing, would escape. *But*, when the guilt of the corporation is *imputed* guilt, and the corporation is to be made liable, because the guilt of its agents, on the ground of public policy, is imputed to them, the reasons are stronger why all *defensive rights* should be enjoyed, than it is even in the case of natural persons themselves.

Is there any reason why the imputed *guilt* of a corporation should be established by a mere preponderance of the evidence, when the guilt of the agent, who always causes the trouble, is required to be established beyond a reasonable doubt?

Is there any reason why that agent should have the right to interpose the statute of limitations, whatever that statute may be, when it has run, and the corporation to which *his* guilt is *imputed*, not be permitted to interpose the defense of the statute of limitations at all?

While there are differences between natural and artificial persons, those differences are *not of a character* that call for discrimination, *in the matter of the rights of trial and defense*.

As said by Mr. Justice Field, in *Neal v. Delaware*, 103 U. S., 370, the equal protection of the laws of a State is extended to persons within its jurisdiction, when its courts are open to them, on the *same condition* as to others, with *like rules* of evidence, and modes of procedure, for the security of their business and property, for the prevention and redress of wrongs, and the enforcement of contracts; and as said by this Court, in *Maxwell v. Dow*, 176 U. S., 596, the nature or character of the *right* of trial by jury, is the same in a criminal prosecution as it is in a civil action.

If the view which is now presented is sound, all corporations, and therefore this defendant corporation, is denied

the equal protection of the laws and due process of law by the Anti-Trust Act of Tennessee, as interpreted by the Supreme Court of that State. If the Legislature was minded to adopt a *civil* procedure to *punish* corporations for a violation of the act, it cannot do so, without according and securing to them all those *defensive rights* which are accorded to natural persons. However, if the view presented in the first place is correct, namely: that call this proceeding what you will, looking through forms and to substance, the case is one of a proceeding against a corporation for the violation of a general criminal law, and to inflict *punishment* upon it for that violation; if that be the correct view, it is not possible, under the general and long-established laws of *Tennessee*, to proceed otherwise than by indictment or presentment. And the Attorney-General admitted and conceded on the trial of this case in the Supreme Court of the State that there was no other way to call upon any one in Tennessee to answer *any* criminal charge, than by indictment or presentment.⁷ No such civil proceeding is valid, nor can it be authorized, *unless* it accords and secures to the accused corporation all those *defensive rights* which are secured and enjoyed whenever the accused person is put to answer a similar criminal charge by indictment or presentment.

National Cotton Oil Co. v. Texas, 197 U. S., 115, is cited by the Attorney General⁸ to support the proposition

⁷Attorney-General's Brief, Trans., p. 487.

⁸Brief on motion to dismiss or affirm, p. 37.

that a bill in equity to oust a foreign corporation for violating an anti-trust statute, is not a criminal prosecution, but is a civil suit. The proposition needs no support. We have not contended that the present proceeding is a criminal prosecution, or that it is not a civil suit. Upon the contrary, we complain because it *is* a civil suit. Our insistence is that it *ought not* to be a civil, but should be a criminal, procedure; or if a civil procedure be allowable, it must be one which affords an opportunity to assert those defensive rights which could be asserted if it were a criminal prosecution, and which *persons* can assert.

The Texas statutes, referred to in the case last mentioned, 197 U. S., 115, are all set out in 177 U. S., at page 28. These statutes and the Penal Code of Texas, are to be read together as one law. So read it will be seen that the laws of Texas provide that foreign corporations guilty of violating the anti-trust law:

1. Shall forfeit a penalty of fifty dollars a day, to be sued for by the Attorney General; and
2. Shall be proceeded against by *quo warranto* and ousted; and
3. Shall be proceeded against by *indictment* and punished. (197 U. S., 133.)

National Cotton Oil Co. v. Texas, 197 U. S., 115, was a *quo warranto* proceeding to oust a foreign corporation.

This Court said that the case was not a criminal prosecution—which of course it was not.

The point was not made nor considered, that inasmuch as it was brought to *punish* the defendant for the violation of a *general criminal law*, it ought to be a criminal prosecution, or ought to admit of the same defensive rights that a criminal prosecution would.

This view of the question was not presented. Moreover, the suit was by petition, and was one in which the accused would have been entitled *under the laws of Texas, to a trial by jury*.⁹ It is true that it was held by the Texas Court in that case, that the case was a civil one, and therefore the guilt of the accused need *not* be proven beyond a reasonable doubt, but *that* point was not considered by *this* Court when the case came here. Nor was that point considered by the Texas Court from the standpoint of the Fourteenth Amendment.

RESUME.

1. The Anti-Trust Act of Tennessee is a *general criminal law*, prohibiting conspiracies against *intra-state* trade.
2. A violation of its provisions by a corporation, is a *misdemeanor*.
3. Ouster is the *punishment* imposed by this Act, upon *foreign* corporations for engaging in a conspiracy against trade, in violation of its terms.

⁹ *Waters-Pierce Oil Co. v. Texas*, 177 U. S., 28.

4. The Sherman Act is a general criminal law prohibiting conspiracies against *inter-state* trade.

5. The transaction at Gallatin, Tennessee, alleged to be a criminal conspiracy against trade, if a conspiracy, is a conspiracy against *interstate* trade, and a violation of the Sherman Act, and *not* a violation of the Anti-Trust Act of Tennessee.

6. The *interpretation* placed by the State Court upon the State Anti-Trust Act, is binding on this Court, and therefore the decision of that Court that this Act relates to *intra-state* commerce alone, is conclusive; but

7. The *application* of that statute, after being so interpreted by the State Court, to a "conspiracy" which is one against *inter-state* commerce, so as to bring *it* within the operation of the *State* law, is not binding on this Court, and makes the *judgment* now sought to be reversed, and the statute, as applied, involve a Federal question; and therefore

8. The State statute, as enforced and applied by the judgment of the State Court, is an unauthorized *regulation* of *inter-state* commerce by the State of Tennessee.

9. The State Anti-Trust Act is void because it denies to the Defendant the equal protection of the laws in the respects mentioned on page 121 hereof; and because it denies to the Defendant due process of law for the same reasons.

10. A statute may be restricted to a *class*, if the members of the class are distinguished by some characteristic peculiar to themselves; but even then the statute, to be valid, must have relation to the peculiar characteristic. Although a statute relate to *all* the members of a class, yet if there be other persons, or classes, with characteristics similar to those of the class to which the statute is made to apply alone, the statute is void, as *arbitrary class legislation*.

11. The statute of limitations of one year is a complete defense to this proceeding.

CONCLUSION.

The Standard Oil Company opened the door for inquiry and invited the fullest investigation into its business methods in Tennessee, when it said in its pleadings that it had never directed or authorized orders given to its competitors in Tennessee to be countermanded by gifts of oil, and that no such thing had ever been done by any of its agents in Tennessee before, and that in this instance it was done by mere *employees* without the knowledge or consent of any *Agent* in authority. (Ans. Trans. 16, 15.) Evidently the State was *searched*, because it was *attempted* to be shown that there was *one* other transaction in which an agent of the Company in another County *suggested* that it would be good policy to give away oil to the *customers* of a certain country *merchant* to compel him to buy oil from the Com-

pany's tank-wagons. It was *not* done; and as the evidence showed the merchant was actually purchasing oil from the Company in barrels at that time. (Trans., 348, 349, 351, 353.)

An examination of the record reveals that the managing officers were ignorant of the transaction at Gallatin, and that it was studiously concealed from them by the employees, Holt and Rutherford, who did it; and that it was found out by Mr. Comer, the Company's Special Agent at Nashville, in charge of that territory, by mere accident.

In this brief we have taken this case to be exactly as the Supreme Court of Tennessee found and stated it to be—that is, that Mr. Comer, the Special Agent, was cognizant of the transaction at the time. *Assuming* that to be the case, in order to work out guilt the court had to, and did, contemplate the Company, and the subordinate agent through whom it acted (for in order to act at all, every corporation must be represented by some agent), as two *distinct* "persons" in the formation of the conspiracy; and that Court also contemplated the Gallatin Merchants with whom the Company's agent was dealing *across the counter*, as being *co-conspirators* with the Company and its agent (State vs. Standard Oil Co., 117 Tenn., 621,625.)

We have not discussed any of those questions, principally for the reason that, taking the case to be as the State Court places it, there are *three* propositions of law that require the reversal of the case: (1) The agreement

or conspiracy is against *inter-state* trade alone, (2) The statute violates the XIV Amendment, (3) and the proceeding is barred by the statute of limitations of Tennessee of one year.

For these reasons we respectfully submit that the decree of the Supreme Court of Tennessee should be reversed.

JOHN J. VERTREES,
Counsel for Appellant.

December, 1909.

APPENDIX.

TENNESSEE CONSTITUTION.

(These sections of the Constitution are referred to on page 111 of this brief.)

Art. 1, Sec. 6. "That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

Art. 1, Sec. 8. "No man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land."

Art. 1, Sec. 14. "No person shall be put to answer any criminal charge but by presentment, indictment, or impeachment."

CODE OF TENNESSEE.

(These sections of the Code are referred to on page 138 of this brief.)

CONSPIRACY.—The crime of conspiracy may be committed by any two or more persons conspiring. . . .

(7) To commit any act injurious to public health, public morals, *trade or commerce*, or for the prevention or ob-

struction of justice or the due administration of the law. (Shann. Code, (Tenn.), Sec. 6693.)

MISDEMEANOR.—“Persons guilty of any conspiracy described in the preceding section, or of a conspiracy at common law, are guilty of a misdemeanor.” . . .

(6) Any conspiracy by two or more persons to do an act *injurious to public trade* as provided in Section 6693 (Code (Tenn.), Sec. 6736, sub-sec. 6.)

FELONIES, MISDEMEANORS, DEFINED.—“All violations of law punished by imprisonment in the penitentiary or by the infliction of the death penalty, are, and shall be denominated *felonies*, and all violations of law punishable by fine, or imprisonment in the county jail, or both, shall be denominated *misdemeanors*.” (Acts 1873, Ch. 57; Shann. Code (Tenn.), Sec. 7185.)

MISDEMEANORS.—“When the performance of any act is prohibited by statute, and *no* penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.” (Shann. Code (Tenn.), Sec. 6437.)

MISDEMEANORS, TWELVE MONTHS.—“All prosecutions for misdemeanors, unless otherwise expressly provided, shall be commenced within *twelve* months next after the offense has been committed.” (Shann. Code (Tenn.), Sec. 6942.)

GAMING, SIX MONTHS.—“All prosecutions for unlawful *gaming* shall be commenced within *six* months after the

offense has been committed." (Shann. Code (Tenn.), Sec. 6943.

BILL UPON RELATION.

An action lies under the provisions of this chapter in the name of the State against the person or corporation offending in the following cases:

(1) Whenever any person unlawfully does or exercises any public offense, or franchise within this State, or any offense in any corporation created by the law of this State.

(2) Whenever any public officer has done or suffered to be done, any act which works a forfeiture of his office.

(3) And when any persons act as a corporation within this State without being authorized by law.

(4) Or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation.

(5) Or exercise powers not conferred by law.

(6) Or fail to exercise powers conferred by law and essential to the corporate existence. (Shann. Code (Tenn.), Sec. 5165.)*

*The Supreme Court of Tennessee holds that the procedure prescribed by this chapter, is also the proper procedure to be employed to oust foreign corporations. (*State ex rel v. Cumb. T. & T. Co.*, 114 Tenn., 194.)

ACTS OF THE LEGISLATURE OF TENNESSEE.

(*This Act is referred to on page 141 of this brief.*)

CHAPTER 89.

AN ACT to prohibit the keeping of any place for the purpose of encouraging, promoting, aiding, or assisting in any betting or wagering upon any kind of a horse race or horse races, or where any bet or wager is permitted to be made upon any horse race or horse races.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee:* That it shall be unlawful for any person, persons, or corporation, whether as owner, lessee, or otherwise, to keep or have under his, their, or its control or management, any room, hall, or house, or a track, path, road, or course, whether within or without an inclosure, for the purpose of encouraging, promoting, aiding or assisting in any bet, or wager upon any kind of a horse race or horse races, or where any bet or wager is permitted to be made upon any kind of a horse race or races, whether by book-making, auction pools, French mutuels, or in any other manner or by any other device whatsoever.

SEC. 2. *Be it further enacted,* That any person violating any of the provisions of Section 1 of this Act shall be guilty of a felony, and, upon conviction in a court of competent jurisdiction, shall be fined not less than two hundred and fifty dollars, nor more than five hundred dollars, and be

imprisoned in the penitentiary not less than one year nor more than three years.

SEC. 3. *Be it further enacted*, That any *corporation* violating any of the provisions of Section 1 of this Act shall, upon conviction in a court of competent jurisdiction, be fined not less than two hundred and fifty dollars, nor more than five hundred dollars, *and, in addition* to such fine, its charter shall, by *such court*, be adjudged to be forfeited, and its corporate existence and right to do business in this State shall cease and determine.

SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.
Passed February 6, 1907.

EVIDENCE THAT PRICE OF OIL WAS NOT ADVANCED AS
RESULT OF THE "CONSPIRACY."

(This evidence is referred to on page 11 of brief.)

The price of oil was advanced about the same time that it was advanced at Gallatin, at *all* other points in Tennessee, thus conclusively showing that these countermanding transactions at Gallatin, were *not* the cause of the one-cent advance in price *there*.

It will also be seen from this list of prices that the price of oil at the towns around Nashville, corresponding to Gallatin, were as follows:

	<i>Per gallon.</i>
1903—Gallatin, June 5.....	13½ cents
Gallatin, October 27.....	14½ cents
Record, p. 218.	
Springfield, July 7.....	13½ cents
Springfield, October 10.....	14 cents
Springfield, October 27.....	15 cents
Record, p. 221.	
Murfreesboro, June 5.....	14 cents
Murfreesboro, October 20.....	14½ cents
Murfreesboro, October 24.....	15 cents
Record, p. 220.	
Lebanon, June 5.....	13½ cents
Lebanon, October 24.....	15 cents
Lebanon, November 20.....	15½ cents
Record, p. 219.	
Franklin, June 5.....	13½ cents
Franklin, October 20.....	14 cents
Franklin, October 24.....	15 cents
Record, p. 218.	

Prices at Gallatin, where it is alleged that the Standard Oil Company had "pre-empted" the market, and secured for itself a monopoly, were as follows:

	<i>Per gallon.</i>
1903—January 1	14½ cents
April 28	14 cents
June 5	13½ cents
October 27	14½ cents

1904—March 8	14	cents
May 24	13½	cents
1905—January 7	13	cents
February 22	12½	cents
April 24	12	cents
1906—June 15	11½	cents
August 18	11	cents
July 5	11	cents

Record, pp. 218, 224, 229, 234, 368.

Thus it appears from the uncontradicted evidence, that the price of oil at Gallatin did *not* advance because competition had been suppressed as the result of countermanding these orders (Record, p. 537), and also that the price of oil has been steadily *reduced* in Tennessee, from year to year.